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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 11

GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL., APPELLANTS,

vs.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

FILED NOVEMBER 17, 1959
PROBABLE JURISDICTION NOTED APRIL 25, 1960

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INDEX

	Original	Print
Record from the U.S.D.C. for the District of Massachusetts		
Docket entries	1	2
Summons and Marshal's return	6	10
Complaint	7	12
Exhibit "A" — 1957 Supplement, Annotated Laws of Massachusetts, Chapter 136, Sections 5 and 6 (2nd Ed.)	17	19
Exhibit "B" — Partial list of Sunday customers of Crown Market	21	23
Motion for preliminary injunction and notice thereof	28	32
Defendant's motion to dismiss the complaint	32	34
Plaintiffs' motion to amend complaint, filed June 13, 1958	33	35
Plaintiffs' motion to amend complaint, filed July 11, 1958	34	36

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 10, 1960

	Original	Print
Record from the U.S.D.C. for the District of Massachusetts—Continued		
Defendant's answer	35	37
Order denying defendant's motion to dismiss	38	40
Stipulation as to facts	39	40
Supplemental stipulation as to facts and transmittal letter from Herbert B. Ehrmann to Clerk, U.S.D.C., dated November 14, 1958	44	44
Transcript of stenographic record on motion to dismiss	46	46
Appearances	46	46
Colloquy between court and counsel	48	47
Statement by Mr. Elcock	51	49
Statement by Mr. Ehrmann	78	67
Testimony of Harold Chernock—		
direct	129	99
cross	143	109
Opinion, Magruder, J.	180	132
Dissenting opinion, McCarthy, J.	199	149
Final decree	230	175
Motion for new trial	232	176
Per curiam opinion on petition for new trial	235	179
Order denying motion for new trial	238	183
Memorandum on order denying motion for new trial, McCarthy, J.	239	183
Dissenting memorandum on order denying motion for new trial, McCarthy, J.	240	184
Notice of appeal to the Supreme Court of the United States	244	187
Clerk's certificate (omitted in printing)	247a	190
Order noting probable jurisdiction	248	190

	Original	Print
Record from U.S.D.C. for the District of Massachusetts	191	191
Dissenting opinion McCarthy, J.—see page 149 of transcript of record		
Complaints of Edward T. Coleman, Gerald A. Driscoll and Thomas J. Kane against Harold Chernock d.b.a. Crown Market	191	191
Certificate of incorporation of Crown Kosher Super Market of Mass., Inc. with certificate of Secretary of the Commonwealth of Massachusetts	197	198
Defendant's bill of exceptions filed September 6, 1956	200	201
Brief for defendant	205	206
Brief for the Commonwealth of Massachusetts	211	210
Bill of complaint filed in the Superior Court in Equity of the County of Hampden with a request for a temporary restraining order	218	216
Subpoena, Notice upon application for preliminary injunction, and temporary restraining order	221	219
Appearance of Charles D. Sloan and Donald A. Clancy	223	222
Interlocutory decree continuing restraining order in force	225	223
Final decree dismissing bill	227	224
Docket entries in Superior Court, Common Law	229	225

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,
Corporate Plaintiff,

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, CHIEF ORTHODOX RABBI OF THE UNITED ORTHODOX CONGREGATIONS OF SPRINGFIELD AND PRESIDENT OF THE MASSACHUSETTS COUNCIL OF RABBIS, suing on behalf of himself and other Rabbis similarly situated, Individual Plaintiffs,

vs.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS.

Attorneys

For Plaintiff: Goulston & Storrs, 50 Federal St., Boston, LI 2-9649.

For Defendant: Matthew J. Ryan, Jr., John J. O'Connor, S. Thomas Martinelli, 36 Court St., Springfield.

Joseph H. Elcock, Jr., Asst. Atty. General for Comm. of Mass., State House—Boston, CA 7-4600 Ext. 252.

Plaintiff's Account		*Received*	*Disbursed*
1958			
May 1	From Herbert B. Ehrmann	15.00	
2	To General Fund		15.00

Malcolm V. McCabe—80 Federal St.—Boston 10, for Mass. Retail Grocers and Provision Dealers Assn.

Henry M. Leen—31 Milk St.—Boston, for Archdiocesan Council of Catholic Men.

Herbert S. Avery—212 Water St., Boston 9, for Lord's Day League of New England.

Leo Pfeffer—15 E. 84th St.—New York 28, for International Religious Liberty Association.

Howard S. Whiteside—30 State St.—Boston, for Southern New England Conference of Seventh Day Adventists.

[fol. 2] 58-471-M

DOCKET ENTRIES

Date 1958		*Filings—Proceedings*	*Amount Reported in Emolument Returns*
May	2	Complaint filed.	15—
	2	McCarthy, J. Request for appointment of additional judges, filed and allowed.	
	5	Summons issued.	
	6	Motion for preliminary injunction, filed.	
	8	Magruder, C.J. Designation of Three-Judge District Court, filed. Hon. Calvert Magruder, U.S. Circuit Judge and Hon. Peter Woodbury, U.S. Circuit Judge to sit with Hon. William T. McCarthy, U.S. District Judge.	
	14	Appearance of Malcolm V. McCabe for Mass. Retail Grocers and Provisions Dealers Assn., Inc., filed.	
	14	Marshal's return of summons with service on May 6, 1958.	
	24	Petition for leave to intervene of Archdiocesan Council of Catholic Men, filed.	

Date 1958	Filings—Proceedings	Amount Reported in Emolument Returns
May 24	Petition for leave to intervene of The Lord's Day League of New England, filed.	
28	Appearances of counsel from City Solicitor's office in Springfield, Mass., for deft. Matthew J. Ryan, Jr., City Solicitor, John J. O'Connor and S. Thomas Martinelli, Assistant City Solicitors, filed.	
28	Defendant's motion to dismiss the complaint filed.	
June 11	Petition for leave to intervene filed by Mass. Federation of Labor.	
12	Petition to intervene as amicus curiae filed by Southern New England Conference of Seventh Day Adventists, filed.	
13	Plff's motion to amend complaint, filed. c/s	
19	Petition to intervene as amicus curiae filed by International Religious Liberty Association.	
23	McCarthy, J. Memorandum, filed. Petitions for leave to intervene filed by The International Religious Liberty Association, The Southern New England Conference of Seventh Day Adventists, The Mass. Federation of Labor, The Lord's Day League of New England and The Archdiocesan Council of Catholic Men of Boston—denied. Copies to counsel.	

Date 1958	Filings—Proceedings	Amount Reported in Emolument Returns
July 11	Plffs' motion to amend complaint assented to and filed.	
23	Appearance of Joseph H. Elcock, Jr., Asst. Atty. Gen., for Governor and Attorney General of the Comm. of Mass., filed.	
24	Letter received from Avery, Dooley, Post & Avery cancelling notice of appeal.	
25	Defendant's answer, filed.	
25	Deft's brief in support of his motion to dismiss the complaint, filed.	
25	Plffs' memorandum in opposition to deft's motion to dismiss, filed.	
Oct. 1	Letters to counsel, case scheduled to be heard Oct. 20, 1958 at 10 AM.	
[fol. 3]		
8	Application for leave to intervene and file a brief on behalf of the Archdiocesan Council of Catholic Men and The Lord's Day League of New England, filed.	
8	McCarthy, D.J. Application for leave to intervene on behalf of the Archdiocesan Council of Catholic Men and The Lord's Day League of New England, allowed.	
20	Brief of International Religious Liberty Association and The Southern New England Conference of Seventh Day Adventists, filed.	
20	Brief of the Intervenors, Lord's Day League of New England and Archdiocesan Council of Catholic Men, filed.	

Date 1958	Filings—Proceedings	Amount Reported in Emolument Returns
Oct. 28	Reply brief of plaintiffs to brief of intervenors, Lord's Day League of New England and Archdiocesan Council of Catholic Men filed by the plaintiff.	
Nov. 7	Letters to counsel, case scheduled to be heard Nov. 13, 1958 at 11 AM.	
13	Brief of the Attorney General of the Comm. of Mass., filed.	
13	Circuit Court of Appeals Chief Judge Calvert Magruder and Circuit Court of Appeals Judge Peter Woodbury and District Court Judge William T. McCarthy—opening of hearing by presentation of argument on motion to dismiss by Joseph H. Elcock, Asst. Attorney General and argument by Herbert B. Ehrmann in opposition to motion with presentation of evidence. Stipulation as to Facts and itemized list of articles and services which may be sold on the Lord's Day, filed in court. Case taken under advisement, one week given plff's counsel to file reply brief.	
14	Supplemental Stipulation as to Facts, filed.	
20	Letter filed by Herbert B. Ehrmann for the plff c/o Clerk's Office to Hon. Calvert Magruder and Peter Woodbury and William T. McCarthy stating in effect plff will not file a further brief since no further legal discussion is needed.	

Date	*Filings—Proceedings*	*Amount Reported in Emolument Returns*
1958		
Dec. 10	Stenographic record of hearing Nov. 13, 1958, filed.	
1959		
Mar. 25	Stenographic record of hearing Nov. 13, 1958, filed.	
May 18	Magruder and Woodbury, Circuit Judges—Opinion of the Court, filed. Copies to counsel.	
June 4	McCarthy, J. Dissenting opinion of the court, filed. Appended to opinion is following: (a) Three copies of criminal complaints filed in Hampden County, Springfield. (b) Certified copy of incorporation of Crown Kosher Super-Market	
[fol. 4]	of Mass., Inc. (c) Bill of Complaint—Superior Court in Equity, Hampden, County, Springfield. (d) Summons (e) Appearance for respondent (f) Interlocutory decree continuing restraining order in force (g) docket entries (h) Brief for the Commonwealth (i) Brief for the Defendant (j) Defendant's Bill of Exceptions.	
12	Magruder and Woodbury, Circuit Judges—Final Decree, filed. Ordered, Adjudged and Decreed (1) That Chapter 136 of the Mass. General Laws (Ter. Ed.) as amended is unconstitutional void and unenforceable as applied to the plff in this action, in so far as it requires the Crown Kosher Super Market to remain closed on after it has remained closed on the preceding Fri-	

Date 1959	Filings—Proceedings	Amount Reported in Emolument Returns
	day night and Saturday; (2) That the defendant, his agents, servants, and employees, and all others acting in his behalf, be, and they hereby are enjoined and restrained from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce Section 5 of said Chapter 136 of the Mass. General Laws (Ter. Ed.), as amended, against the plffs in this action; and it is further Ordered, Adjudged and Decreed that the plffs recover the costs of these proceedings, to be taxed by the Clerk of this Court.	
June 12	Magruder and Woodbury, Circuit Judges—Ordered, Adjudged and Decreed that deft's motion to dismiss is denied.	
12	Copies of Final Decree and notice of denial of Deft's Motion to dismiss mailed to S. Thomas Martinelli, Asst. City Solicitor of Springfield and Joseph H. Elcock, Jr., Asst. Atty. General.	
12	Letter to Hon. Calvert Magruder, Chief Judge Court of Appeals from Joseph H. Elcock, Jr., Asst. Atty. General in accordance with request of Judge Magruder, filed.	
22	Attorney General's motion for new trial, filed. c/s	
July 7	Plaintiffs' Memorandum in Opposition to Defendant's Motion for a new trial, filed. c/s	

Date 1959	Filings—Proceedings	Amount Reported in Emolument Returns
July 9	Attorney General's Memorandum in Support of Motion for a New Trial, filed.	
20	Per Curiam Opinion of the Court, on Petition for Rehearing, filed. Copies to counsel.	
20	Magruder, USCJ (Ret.) Order, filed. Ordered, Adjudged and Decreed that the motion (for a new trial, filed by the Attorney General of the Comm. of Mass.) be, and the same hereby is, denied. Copies to counsel.	
[fol. 5]		
23	McCarthy, J. Memorandum, filed. Copies to counsel.	
Sept. 18	Appearance of Edward J. McCormack, Jr., Atty. Gen., for Governor of Massachusetts, Foster Furcolo, Raymond P. Gallagher, Chief of Police, City of Springfield, Mass. and Edward J. McCormack, Jr., Attorney General, filed.	
18	Appearance of John Warren McGarry, Esq., Asst. Atty. General for Governor of Massachusetts, Foster Furcolo, Raymond P. Gallagher and Edward J. McCormack, Jr., Atty. General.	
18	Appearance of Joseph H. Elcock, Jr., Esq., Asst. Atty. General for Governor of Massachusetts, Foster Furcolo, Raymond P. Gallagher and Edward J. McCormack, Jr., Esq., Atty. General.	

Date 1959	Filings—Proceedings	Amount Reported in Emolument Returns
Sept. 18	Appearance of S. Thomas Martinelli, Esq., City Solicitor, Springfield, Mass., for Raymond P. Gallagher, Chief of Police, City of Springfield, Mass.	
18	Notice of Appeal filed by the defendants Raymond P. Gallagher, Chief of Police of the City of Springfield, Mass. together with Edward J. McCormack, Jr., Attorney General of the Commonwealth of Massachusetts and Foster Furcolo, as he is Governor of the Comm. of Massachusetts and both entitled to notice as provided in 28 USC Sec. 2284 (2) hereby appeal to the Supreme Court of the U. S. from the Final Decree declaring Chapter 136 of the Mass. General Laws (Ter. Ed.) as amended, unconstitutional, void and unenforceable as applied to the pltffs and enjoining and restraining the defendant Raymond P. Gallagher from enforcing Sec. 5 of said Chapter 136 as against the pltffs. said decree having been entered on June 12, 1959. The said defendants further appeal from the Denial of the Defendant's Motion to Dismiss, also entered on June 12, 1959 and from the Denial of the Defendant's Motion for a New Trial, entered on July 20, 1959. This appeal is taken pursuant to 28 USC 1253. c/s to Herbert B. Ehrmann, Esq., Goulston & Storrs, 50 Federal St., Boston, Mass., Ribicoff and Kotkin, 64 Pearl St., Hartford, Conn., Fein, Cavanaugh & Kimball, 1421 Main St., Springfield, Mass.	

Date 1959	Filings—Proceedings	Amount Reported in Emolument Returns
Oct. 2	Appearance of Raya S. Drebenco—counsel for pltffs. filed.	
Oct. 2	Cross-Designation by Appellees by Herbert B. Ehrmann, Esq., et al. filed. c/s.	
Nov. 12	McCarthy, J. Dissenting Memorandum of Nov. 12, 1959, filed.	

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 6] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
..... DIVISION

Civil Action File No. 58-471-M

[Stamp
Office of
U. S. Marshal
May 5 3 33 PM '58
Dist. of Mass.]

[Title omitted]

SUMMONS—Filed May 14, 1958

To the above named Defendant:

You are hereby summoned and required to serve upon Herbert B Ehrmann and Goulston & Storrs plaintiff's attorney, whose address is 50 Federal Street Boston Massachusetts an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail

to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John A Canavan, Clerk of Court, Frances R. Foley, Deputy Clerk.

[Seal of Court]

Date: May 5 1958

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 6a] RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 5th day of May 1958, I received this summons and thereafter on the 6th day of said May at 3 p. m., I summoned the within named defendant to answer as herein directed by giving to him in hand at Police Station Springfield in said District a true and attested copy of the within summons, together with copy of complaint.

Ralph W. Gray, United States Marshal, By Christopher Ghiloin, Deputy United States Marshal.

Marshal's Fees

Travel	$19.20
Service	2.00
	21.20

Subscribed and sworn to before me, a
this _____ day of _____, 19

[Seal] .....

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

[fol. 7] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

[Title omitted]

COMPLAINT—Filed May 1, 1958

I. Jurisdictional Allegations

1. This is a suit of a civil nature praying for the convening of a Three-Judge District Court under 28 U. S. C. § 2284 for a preliminary and permanent injunction to restrain the enforcement, operation or execution of a state statute upon the ground of unconstitutionality. This suit also prays for the declaration of the rights and other legal relations of the interested parties seeking such declaration in an actual controversy between the Plaintiffs and the Defendant under the provisions of 28 U. S. C. §§ 2201-2202.

2. This suit arises under the Constitution of the United States, more particularly under the First and Fourteenth Amendments thereof, and under Title 42 U. S. C., § 1983. Jurisdiction of the matters involved in this suit is conferred on this court under the provisions of 28 U. S. C. § 1343 (3) [fol. 8] to redress and prevent the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States and by acts of Congress; and under § 1331 as a civil action arising under the Constitution and laws of the United States.

3. The matter in controversy, between the Corporate Plaintiff and the Defendant, exceeds the sum of Three Thousand Dollars ($3,000) exclusive of interest and costs.

II. Statute Involved

4. The statute involved in this suit is Mass. G. L. (Ter. Ed.) c. 136 entitled "Observance of the Lord's Day". The sections of the said chapter which the Defendant seeks to enforce against the Plaintiffs are §§ 5-6 thereof, as amended,

a copy of which is attached hereto as Exhibit A and made a part of this Complaint. The Defendant has interpreted "Lord's Day" to mean Sunday. Section 6 recognizes that there are those who, according to their religious belief, observe Saturday as the Lord's day, but the purported relief extended to such persons is severely limited, discriminatory and impracticable.

III. The Parties and Factual Allegations

5. The Corporate Plaintiff, Crown Kosher Super Market of Mass., Inc. is a corporation duly organized under the laws of the Commonwealth of Massachusetts which owns and operates, and which, since October 1953, has owned and operated a kosher super market located at 59 Sumner Avenue in Springfield, hereinafter referred to as Crown Market, selling food to Orthodox and Conservative Jewish persons, prepared in accordance with the tenets of their religion.

[fol. 9] 6. Because of the religious convictions of the Corporate Plaintiff's stockholders, officers and managers, and because of religious regulations, it is closed at sundown on Friday and is not reopened until Sunday morning.

7. The Corporate Plaintiff serves approximately two thousand Orthodox and Conservative Jewish persons.

8. Its weekly volume averages approximately $15,000 gross and its Sunday volume averages approximately $5,000 gross.

9. Crown Market's Sunday clientele averages about five hundred customers, the great majority of whom, because of working hours and other considerations, would find it extremely difficult and in some cases impossible, to make all their kosher food purchases on week days.

10. Crown Market is open from eight o'clock A.M. to six o'clock P.M. Monday, Tuesday and Sunday and from eight o'clock A.M. to nine o'clock P.M. Wednesday and Thursday and from eight o'clock A.M. to sundown on Fridays. It is closed all day Saturday. Its Sunday trade, assuming that the customers could shop during the evening

hours, cannot adequately be served during the brief evening hours when said market is open.

11. Crown Market is a completely kosher super market under the constant supervision of the Rabbinical Council of Springfield, selling kosher groceries, kosher baked goods, kosher meats, kosher fish, kosher delicatessen, kosher dairy products, and fruits and vegetables. The said Rabbinical Council is recognized by persons of the Orthodox Jewish faith of the Springfield area as their religious authority.

12. Crown Market is the only market in the Springfield area where all types of foods bearing the necessary Rabbinical seals attesting to their being kosher may be purchased.

[fol. 10] 13. Crown Market serves and is patronized almost exclusively by the Orthodox and Conservative Jewish populations of Springfield and the surrounding area for a considerable radius which includes communities such as Holyoke, Longmeadow, Palmer, Turner Falls, Massachusetts and the northern part of Connecticut.

14. During the period of Passover, which lasts eight days, all food consumed by persons of Orthodox Jewish faith must be prepared under special conditions applicable to food to be consumed during the Passover period and must bear a special Rabbinical seal attesting thereto. At other times, said persons may eat only kosher meat, dairy products and certain other kosher foods.

15. The Plaintiffs, Irving Heafitz, Morris Chaitovsky and Mrs. Ruth Cohen, are Orthodox Jewish customers of Crown Market who eat kosher food because of religious convictions and who, because of their employment and religious beliefs, as more particularly set forth in Paragraphs 15 and 16 can conveniently do their weekly marketing only on Sunday. They bring this action on behalf of themselves and many others, a number of whom are listed in Exhibit B hereof, similarly situated. Orthodox Jewish customers of Crown Market who live at a distance and are dependent on the Crown Market for their securing kosher foods throughout the year on Sunday, and especially during Passover, number several hundred families, and it is, there-

fore, impractical to bring them all before the Court, but the Plaintiffs named in this paragraph are fairly representative of the group.

16. Plaintiffs, Irving Heafitz and Morris Chaitovsky, each live more than three miles from Crown Market. They are each married and have four children. Their wives are dependent on them for transportation to market. They [fol. 11] are both engaged in the junk business. Because of the type of work in which they are engaged they cannot market in their work clothes. They cannot return home from work, wash up, eat their dinner and reach the Crown Market on week nights in time to do all their weekly marketing.

17. Mrs. Ruth Cohen lives in Turner Falls Massachusetts. She is the mother of four children. Her husband is employed during the week. Because of her household duties she cannot reach Crown Market (or any other kosher market) during the week in time to do her weekly marketing.

18. Plaintiff, Rabbi Moses D. Sheinkopf, is the Chief Orthodox Rabbi of The United Orthodox Congregations of Springfield, charged with the duty of seeing that the Orthodox Jews in the Springfield area have foods prepared in accordance with the laws of Kashruth available to them. He is also President of the Massachusetts Council of Rabbis which is composed of all the Orthodox Rabbis in Massachusetts. The number of Orthodox Rabbis in Massachusetts number approximately fifty and it is, therefore, impracticable to bring them all before the Court. Rabbi Sheinkopf brings this action on behalf and at the request of all said Orthodox Rabbis.

19. The defendant, Raymond P. Gallagher, is Chief of Police of the City of Springfield, charged with enforcing Mass. G. L. (Ter. Ed.) c. 136 §§ 5-6, as amended.

20. The defendant has authority to make arrests for violation of State statutes and has arrested and prosecuted the manager of Crown Market for keeping the store open on Sunday.

IV. Rights and Issues

21. Plaintiffs have a right preserved to them by the [fol. 12] First Amendment of the Constitution of the United States to the free exercise of their religion and to be protected against the establishment of any particular religion. Under the Fourteenth Amendment, the several states are forbidden to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or deprive any person of liberty or property without due process of law or which shall deny to any person within its jurisdiction the equal protection of the laws. Section 1983 of Title 42 U. S. C. provides that every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Said Mass. G. L. (Ter. Ed.) c. 136 §§ 5-6, as amended, are unconstitutional and of no legal effect, in that they contravene the aforesaid rights in the following manner:

A. They establish the first day of the week, Sunday, as the Lord's day, contrary to the religion of the Plaintiffs.

B. Plaintiffs, Irving Heafitz, Morris Chaitovsky, Ruth Cohen, and Crown Market's other Orthodox customers who live at a distance from Crown Market cannot supply their dietary needs, in accordance with their religion, without interruption of their work on which they are dependent for a livelihood or other serious inconvenience.

C. Plaintiff, Rabbi Moses D. Sheinkopf, and the other Rabbis whom he represents, cannot fulfill their religious [fol. 13] duty to their congregations of making foods prepared in accordance with their religion at times when they are able to purchase them available to them.

D. Although the plaintiff, Crown Kosher Super Market of Mass., Inc. keeps its market closed on Saturday because

of the religious belief of its stockholders, officers, employees and customers, it is forced to keep its market closed on Sunday, also, so that it, Crown Kosher Super Market of Mass., Inc., is compelled to keep its market closed for two days in each week while other markets similarly situated but not sharing the religious beliefs of its stockholders, officers, employees and customers need be closed only one day in each week.

E. It permits the sale of numerous food products on Sundays by other stores and vendors, much of which is neither necessary nor in keeping with the Lord's day, while forbidding the sale, in said Plaintiff's store, of food products having a religious significance.

F. It denies to the Individual Plaintiffs the equal protection of the laws by restricting their opportunity to purchase requisite food to five days in each week because they observe Saturday as the Lord's day, whereas those who observe Sunday as the Lord's day may make food purchases on six days of each week.

G. It has become so riddled with exceptions permitting the sale of so many unnecessary food and other products, and so many entertainment, recreational and other activities not in keeping with the spirit of the Lord's day, that the statute is no longer a valid exercise of the police power of the state.

V. Allegations of Equitable Jurisdiction

22. There is an actual controversy between the Plain-[fol. 14] tiffs and the Defendant in respect to his right to enforce the provisions of Mass. G. L. (Ter. Ed.) c. 136, §§ 5-6, as amended, insofar as they effect the Plaintiffs and those whom they represent.

23. Plaintiffs have no adequate remedy at law.

24. If Plaintiff, Crown Kosher Super Market of Mass., Inc., is required to close Crown Market on Sundays, Plaintiffs will suffer irreparable injury in that: Plaintiff, Crown Kosher Super Market of Mass., Inc., will lose approximately one-third of its gross business; Plaintiff, Rabbi Moses D. Sheinkopf and the other Rabbis whom he represents will

be unable to fulfill their duties to their congregations; and, Plaintiffs, Irving Heafitz, Morris Chaitovsky, Ruth Cohen, and other customers of Crown Market whom they represent will be unable to secure provisions prepared in accordance with their religion at times when they are able to purchase them. There is no practical way in which the Plaintiff, Crown Kosher Super Market of Mass., Inc., can serve the needs of its customers, or its customers can fill said needs other than by the purchase and sale at retail in Crown Market on Sunday.

Wherefore, Plaintiffs Pray:

1. That this action be heard by Three-Judge Court under §2284, U. S. C. Title 28.

2. That the Court shall adjudge the said Mass. G. L. (Ter. Ed.) c. 136 §§5-6, as amended, unconstitutional, void and unenforceable as applied to the plaintiffs for the reasons heretofore stated.

3. That the Court shall issue a preliminary and final injunction, after notice and hearing, against the defendant, in his official capacity, and all other Massachusetts and local authorities who would have any authority to take [fol. 15] any action toward the enforcement of said laws and that such persons and defendants be enjoined and restrained from taking any steps whatsoever in court or out of court looking to the enforcement of the said laws.

4. Such other and further equitable relief as the plaintiffs may show themselves entitled to have.

Attorneys For Plaintiffs:

Herbert B. Ehrmann, Goulston & Storrs, 50 Federal Street, Boston, Massachusetts;

Irving S. Ribicoff, Ribicoff and Kotkin, 64 Pearl Street, Hartford, Connecticut;

Samuel L. Fein, Fein, Cavanaugh & Kimball, 1421 Main Street, Springfield, Massachusetts.

[fol. 16] *Duly sworn to by Harold Chernock, jurat omitted in printing.*

[fol. 17]

EXHIBIT A TO COMPLAINT

1957 Supplement, Annotated Laws of Massachusetts, Chapter 136, Sections 5 and 6, (2nd Ed.)

"*Sec. 5. Keeping Open Shop, etc., and Doing Certain Work etc., Prohibited.*

Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars. (CL 133, Secs. 1, 2; 1692-3, 22, Sec. 1; 1716-7, 13, Sec. 1; 1727-8, 5, Secs. 1, 4; 1760-1, 20, Secs. 2, 9; 1782, 23, Sec. 1; 1791, 58, Sec. 1; 1796, 89, Sec. 1; RS 50, Sec. 1; GS 84, Sec. 1; 1862, 152; PS 98, Sec. 2; 1895, 434, Secs. 2, 4; RL 98, Secs. 2, 5; 1904, 460, Sec. 2; 1909, 423, Sec. 4; 1918, 257, Secs. 336, 338; 1919, 5; 1920, 2.)"

"*Sec. 6. Limit of Operation of Preceding Section.*

The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail

sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

[fol. 18] Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers,

then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon; of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vege- [fol. 19] tables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing

and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibition held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section 4 A or section 4B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. (RS 50, Sec. 10; GS 84, Sec. 9; PS 98, Sec. 13; 1886, 82; 1887, 391, Sec. 2; 1893, 41; 1895, 434, Sec. 2; 1900, 440; 1901, 80; RL 98, Secs. 3, 4; 1902, 414, Sec. 1; 1908, 126, Sec. 1; 273, Sec. 1; 333; 343; 1909, 420, Sec. 2; 423, Sec. 5; 1910, 327; 1911, 328, Sec. 1; 1914, 757, Sec. 1; 1916, 146, Sec. 1; 1917, 207; 1927, 175; 1928, 234; 929, 118; 1930, 143; 179; 1931, 240; 1932, 96; 1933, 150, Sec. 3; 1934, 328, Sec. 7; 1934, 354; [fol. 20] 1934, 373, Sec. 6; 1936, 189; 1937, 286; 1938, 143; 1943, 473; 1946, 207, Sec. 4; 1949, 190; 1950, 256, Sec. 1; 1950, 322; 1950, 681; 1951, 504; 1954, 217; 1955, 304, appvd. April 22, 1955; on the same day declared by the Governor to be an emergency law, effective therewith.)"

[fol. 21]

Exhibit B to Complaint

Partial List of Sunday Customers of Crown Market

Phillip Ginsberg	204 Commonwealth Ave.	Springfield, Mass.
Irving Mittleman	56 Garland Street	Springfield, Mass.
Jack Skuken	84 King Street	Springfield, Mass.
Goldie Skuken	69 Vadnais Street	Springfield, Mass.
Hannah Huwortz	126 Wheeler Avenue	Springfield, Mass.
Mrs. I. Leporetsky	119 Wheeler Avenue	Springfield, Mass.
Mrs. Edward Conter	68 Windsor Place	Longmeadow, Mass.
M. J. Alinston	258 Capen Street	Springfield, Mass.
Mrs. R. Heischbaut	30 Pinebrook Drive	Springfield, Mass.
Mrs. N. Libby		Enfield, Conn.
Seth Slade	47 Sanes Street	Springfield, Mass.
Al Greenberg	55 Sterling Street	Springfield, Mass.
Samuel A. Greenberg	37 Narragansett St.	Springfield, Mass.
Isadore Sender	37 Matten Street	Springfield, Mass.
William Daleslenoga	131 Johnson Street	Springfield, Mass.
Sol Chantam	15 Carroll Street	Springfield, Mass.
Irv Bernstein	89 Randolph Street	Springfield, Mass.
Beverly Goldberg	533 Dickenson Street	Springfield, Mass.
Ruth Stamborsky	84 Maryland Street	Springfield, Mass.
Bertha K. Rudek	109 Maryland Street	Springfield, Mass.
Mrs. L. Skecker	101 Woodlawn Street	Springfield, Mass.
M. E. Robbins	87 Bellevue Avenue	Springfield, Mass.
Harold Okem	78 Colony Road	W. Springfield, Mass.
Mrs. S. Severman	44 W. Crystal Brook St.	Springfield, Mass.
Mrs. S. Cohen	540 Dickinson Street	Springfield, Mass.
J. Weber	73 Biltmore Street	Springfield, Mass.
Samuel Chester	149 Pleasantview	Longmeadow, Mass.
Ray Humberston	8 Meredith St.	Springfield, Mass.
Robert Humberston	8 Meredith St.	Springfield, Mass.
Denise Humberston	8 Meredith St.	Springfield, Mass.
Rabbi E. Ziegler	40 Kennwoulth St.	Springfield, Mass.
Helen Shapiro	53 Rueleland St.	Springfield, Mass.
Merrill G. Block	50 Abbott St.	Springfield, Mass.
Ray K. Coen	19 Viola Road	Longmeadow, Mass.
Milton LaMelle	824 Sumner Avenue	Springfield, Mass.
Louis Flaks	54 Hebron St.	Springfield, Mass.
Sadie Nathanson		Holyoke, Mass.
Samuel Bean		Holyoke, Mass.
Mrs. M. Naitiarem		Holyoke, Mass.
L. Huber	58 Bronson Terr.	Springfield, Mass.
Alan Alpert	109 Greenland Street	Springfield, Mass.
Milton Rosenberg	67 Bilker Street	Springfield, Mass.
Jacob Libons	19 Kenard Road	Springfield, Mass.

Raymond W. Cossin	15 Rittenhouse Terr.	Springfield, Mass.
Norman Trudlind	18 Garden St.	Springfield, Mass.
Max Selgel	43 Plymouth Road	Longmeadow, Mass.
Joseph Chase	38 Narragansett St.	Springfield, Mass.
Milton Kaplan	71 Firglade Avenue	Springfield, Mass.
Guy Nessenbaum	101 So. Park Avenue	Longmeadow, Mass.
Abe Solomon	29 Homer Street	Springfield, Mass.
Helen Kisner	15 Graham Street	Springfield, Mass.
D. Selwitz	109½ Oak Lane Street	Springfield, Mass.
Sidney Romanoff	68 Daviston Street	Springfield, Mass.
J. F. Collins	6 Maplewood Terrace	Springfield, Mass.
F. Caplan	36 Warner Street	Springfield, Mass.
G. Sugliman	11 Priscilla Street	Springfield, Mass.

[fol. 22]

L. Lehman	113 Lexington Street	Springfield, Mass.
H. Hallinstein	89 E. Alvord Street	Springfield, Mass.
H. H. Bettman		Westover, Mass.
Myer Ezrin	401 Commonwealth Ave.	Springfield, Mass.
Morris Buff	201 Commonwealth Ave.	Springfield, Mass.
Marilyn Greenberg	55 Sterling Street	Longmeadow, Mass.
Selma Greenberg	28 Sumner Avenue	Springfield, Mass.
M. Shepin	77 Commonwealth Ave.	Springfield, Mass.
Paul Bogus	119 W. Alvord Street	Springfield, Mass.
Irving Weiner	77 Virginia Street	Springfield, Mass.
Nathan Gordenter	452 Dickinson Street	Springfield, Mass.
Phillip Berman	215 Westbrook Drive	Springfield, Mass.
Earl Winer	76 Meadowbrook Road	Longmeadow, Mass.
Maurice Spevak	228 Navajo Road	Springfield, Mass.
Barnett Greenberg	184 Magerlin Circle	Longmeadow, Mass.
Bentzman	158 Woodlawn Street	Springfield, Mass.
H. Gerstein	31 Cherryvale Ave.	Springfield, Mass.
Julius Resnick	40 Oswego Street	Springfield, Mass.
Mrs. Murray Resnick	42 John Street	Springfield, Mass.
Mrs. Ida Brosky	44 John Street	Springfield, Mass.
Sherman Raner	320 Dwight Road	Springfield, Mass.
Aline Ehrlick	86 Longhill Street	Springfield, Mass.
Charlotte Meyer	567 Laurel Street	Longmeadow, Mass.
Mary Rome	35 Brookline Avenue	Springfield, Mass.
Fred Berman	75 Longhill Street	Springfield, Mass.
Myer Sadler	262 Harberek Street	Springfield, Mass.
Antonio Santaniello	119 Mentmorence St.	Springfield, Mass.
Mrs. R. H. Kanter	127 Hybrid Terrace	Springfield, Mass.
Esther Weiss	98 Monroe St.	Agawam, Mass.
Roman J. Partyke	106 Washburn St.	Springfield, Mass.
Lloyd Shabazz	538 Union Street	Springfield, Mass.
Harry Edlin	435 Tufton Road	Springfield, Mass.
Ethel Ruklas	26 Greenleaf St.	Springfield, Mass.
Norman Gelfand	507 Plainfield St.	Springfield, Mass.

Al Rosenthal	175 Chalmers Street	Springfield, Mass.
Jerome Kern	327 Commonwealth Ave.	Springfield, Mass.
Jennie Somell	11 Taft Street	Springfield, Mass.
Nathan Somell	11 Taft Street	Springfield, Mass.
Rabbiney Fein	108 Olmsted Drive	Springfield, Mass.
Mrs. Rault	172 Rayton Street	Springfield, Mass.
Pearler Aaron		Longmeadow, Mass.
Sophie Finn	161 Sumner Ave.	Springfield, Mass.
George Nutas	17 Rinsworth St.	Springfield, Mass.
Mary Cohen		Westfield, Mass.
Reuben Greenberg	1114 Allen Street	Springfield, Mass.
N. J. Fieldman	18 Livington Road	Springfield, Mass.
L. Lear	104 Sumner Ave.	Springfield, Mass.
A. Gertel	192 Long Street	Springfield, Mass.
A. Hirsch	1684 Northampton St.	Holyoke, Mass.
Charles Ruskin	214 Chapin Terrace	Springfield, Mass.
Bessie Alibes	292 Sumner Avenue	Springfield, Mass.
Morris Leskowicz	131 Hoodlawn Street	Springfield, Mass.
Joseph Norkin	32 Lexington Street	Springfield, Mass.
Max Leht	22 Lindsay Road	Springfield, Mass.
Paul Cohen	63 Longhill Street	Springfield, Mass.
Mrs. H. Ziff	62 Northampton St.	Springfield, Mass.
Martin M. Marcus	6 Piney Place	Springfield, Mass.
Reginard Z. Bloome	2433 Main Street	Springfield, Mass.
Mrs. Samuel Gaberman	129 Appleton Street	Springfield, Mass.
Alfred D. Cummings	46 Abewood Terr.	Holyoke, Mass.
[fol. 23]		
Sara G. Fisher	41 Palmyra Street	Springfield, Mass.
Jack Talburt	171 Hartford Terr.	Springfield, Mass.
Myer Falk	65 Harkness Avenue	Springfield, Mass.
Doris Zucker	16 Whitten Avenue	Springfield, Mass.
Mrs. Irving Perry	64 Vail Street	Springfield, Mass.
Mrs. Senior Katz	556 Laurel Street	Longmeadow, Mass.
Martin Lefebre	26 Coomes Road	Springfield, Mass.
Walter Vogel	37 Ft. Pleasant Terr.	Springfield, Mass.
M. Rothin	186 Ledyard Terr.	Springfield, Mass.
Morris Gelfand	507 Plainfield St..	Springfield, Mass.
Harry Landis	77 Whittier Street	Springfield, Mass.
G. Allan	30 Bellevue Avenue	Springfield, Mass.
Harry Solliter	82 Olmsted Drive	Springfield, Mass.
Stephen Smith	46 Eckington Street	Springfield, Mass.
Bessie Norkin	38 Kittrell Street	Springfield, Mass.
Mrs. Baker	136 Woodside Terr.	Springfield, Mass.
H. S. Krastin	54 Lester Street	Springfield, Mass.
George Steinberg	119 Fireglade Ave.	Springfield, Mass.
Gertrude Steinberg	119 Fireglade Ave.	Springfield, Mass.
Mrs. Ira Markowitz	93 Carver Street	Springfield, Mass.

Mrs. Carl Rudman	91 Carver Street	Springfield, Mass.
David Brook	63 Copeland Street	Springfield, Mass.
Bertram Shatz	30 Colony Acres Road	Longmeadow, Mass.
Louis Hurwitz	50 Derryfield Ave.	Longmeadow, Mass.
M. A. Polep	122 W. Crystal Brk. Dr.	Springfield, Mass.
Solomon Fagin	50 Burnside Terr.	Springfield, Mass.
Lenore Goldsmith	98 Brether Road	Springfield, Mass.
Irving Connick	141 Carver St.	Springfield, Mass.
Gerson Gordon	103 Bronson Terr.	Springfield, Mass.
Mrs. H. A. Levine	58 Olmsted Drive	Springfield, Mass.
Edward Torff	131 Ft. Pleasant Ave.	Springfield, Mass.
M. Bella	43 Jeffery St.	Springfield, Mass.
Carl Rudman	91 Carver Street	Springfield, Mass.
David Superman	89 Roosevelt Avenue	Springfield, Mass.
Harold Roschlin	44 Sumner Avenue	Springfield, Mass.
Herbert M. Posnee	136 Washington Road	Springfield, Mass.
Sylvia Rosen	58 Rockland St.	Springfield, Mass.
Lorraine Robbins	87 Bellevue Avenue	Springfield, Mass.
Mrs. G. Teefman	244 Sumner Avenue	Springfield, Mass.
Herbert Zewitz	51 Washington Street	Springfield, Mass.
N. Pengton	24 Sumner Avenue	Springfield, Mass.
Elaine Greenberg	96 Emerson Street	Springfield, Mass.
Jerome Krandall	85 Lynwood Drive	Springfield, Mass.
Victor Kusnetz	101 Groveland Street	Springfield, Mass.
Helen Ascher	76 Spruceland Ave.	Springfield, Mass.
Nicholas Damato	108 Brimson Street	Springfield, Mass.
Sidney Spungin	76 Byers Street	Springfield, Mass.
Milton Sheeasky	119 Marvyn Place	Springfield, Mass.
Jerome M. Pfeifer	190 Commonwealth Ave.	Springfield, Mass.
Lebe Gelstein	131 Cherryvale St.	Springfield, Mass.
Mrs. A. B. Abramson	63 Washington St.	Springfield, Mass.
Max Roos	121 Wayise Street	Springfield, Mass.
Joseph Hyman	350 Gillette Ave.	Springfield, Mass.
Seymour J. Boger	105 Olmsted Drive	Springfield, Mass.
Earle Davis	77 Longhill Street	Springfield, Mass.
Gerson Ashinas	191 Garland Street	Springfield, Mass.
Louis Kinsman	141 Reyfred Terrace	Springfield, Mass.
Marc Gwintch	18 Washington Road	Springfield, Mass.
Julius Green	218 Ft. Pleasant Ave.	Springfield, Mass.
Joseph Block	199 Chalmer St.	Springfield, Mass.

[fol. 24]

Albert Schunitz	169 Abbott Street	Springfield, Mass.
Robert S. Ehzlick	86 Longhill Street	Springfield, Mass.
Milly Rome	133 Lexington Street	Springfield, Mass.
Marcia Schwartz	166 Garland Street	Springfield, Mass.
Mrs. Dorothy Sadler		
Marion Needle	73 So. Main St.	Brattleboro, Vt.

vin Needie	73 So. Main St.	Brattleboro, Vt.
ian Horowitz	248 Ft. Pleasant Ave.	Springfield, Mass.
old A. Levine	58 Olmsted Drive	Springfield, Mass.
aid B. Caplan	36 Warner Street	Springfield, Mass.
den T. Frye	118 Longhill Street	Springfield, Mass.
Hirshan	48 Gilman Street	Holyoke, Mass.
B. Frust	62 Cherryvale Ave.	Springfield, Mass.
Selectmen	32 Greenwood Ave.	Holyoke, Mass.
T. Gurvitsh	64 Beacon Avenue	Holyoke, Mass.
ie Rothenberg	378 Appleton Street	Holyoke, Mass.
David Samon	383 Hillside Ave.	Holyoke, Mass.
s Kobrosky	105 Packard Ave.	Springfield, Mass.
S. Weinstein	22 Carol Lane	Holyoke, Mass.
B. Soltz	88 Westfield Road	Holyoke, Mass.
Weinstein	22 Cural Lane	Holyoke, Mass.
C. Kaze	84 Lindale Street	Springfield, Mass.
inclair	579 Laurel St.	Longmeadow, Mass.
Norkin	38 Kittrell St.	Springfield, Mass.
y Abramson	126 Woodside Terr.	Springfield, Mass.
Feldman	128 Carver Street	Springfield, Mass.
y Bogoffe	65 Sumner Avenue	Springfield, Mass.
Vidantz	784 Allen Street	Springfield, Mass.
ard J. Queen	72 Virginia Street	Springfield, Mass.
e Ginsberg	11 Biltmore St.	Springfield, Mass.
ha B. Laub	20 Sumner Avenue	Springfield, Mass.
on B. Levine	48 Eddywood Street	Springfield, Mass.
ene Tarsky	188 Commonwealth Ave.	Springfield, Mass.
nare	Hirshall St.	Springfield, Mass.
p Zeller	62 Olmsted Drive	Springfield, Mass.
ert Srige	118 Longhill Street	Springfield, Mass.
ard H. Juros, DDS	Westover AFB	Westover, Mass.
me Braf	116 Larkspur St.	Springfield, Mass.
ph Bernstein	472 Carebb St.	Springfield, Mass.
y Kisher	65 Laurel Street	Longmeadow, Mass.
ur Pomerantz	55 Blaine Street	Springfield, Mass.
M. Chase	91 Ridge Road	Longmeadow, Mass.
an E. Learner	117 Firglade Ave.	Springfield, Mass.
. Shapiro	39 Mansfield Street	Springfield, Mass.
ph Chestein	18 Parkwood St.	Springfield, Mass.
Roberts	178 Woodlawn St.	Springfield, Mass.
M. Goodman	180 Woodlawn St.	Springfield, Mass.
R. Alpert	180 Woodlawn St.	Springfield, Mass.
C. Alake	42 Elwood Drive	Springfield, Mass.
Kosinski	136 Cabot Street	Springfield, Mass.
an Stein		Holyoke, Mass.
s Gillbe	61 Forest Park Ave.	Springfield, Mass.
Annette C. Spivak		Springfield, Mass.
p Katzman	440 Summer Avenue	Springfield, Mass.

Sam Schlon	8 Grassy Gutter Rd.	Springfield, Mass.
Max Nugher	133 Fountain St.	Springfield, Mass.
Nathan S. Elkin	274 Orange Street	Springfield, Mass.
Dinah Domowitz	274 Orange Street	Springfield, Mass.
Saul Finestone	85 Belmont Avenue	Springfield, Mass.
D. Chester	22 Crown Street	Springfield, Mass.

[fol. 25]

Henry Zilkin	50 Jefferson Avenue	Springfield, Mass.
Philys Winniman	54 Fountain Street	Springfield, Mass.
A. Rosenfeld	152 Belvidere Street	Springfield, Mass.
R. Tevelav	58 Euclid Avenue	Springfield, Mass.
M. Press	41 Mallowhill Road	Springfield, Mass.
P. Rudef	109 Maryland St.	Springfield, Mass.
Victor Baker	75 Seyfred Terr.	Springfield, Mass.
Samuel Tyler	16 Sachem Street	Springfield, Mass.
Robert Zivire	147 Cooley Drive	Longmeadow, Mass.
Harriet Beelser	148 Cooley Drive	Longmeadow, Mass.
Min Mittleman	156 Garland Street	Springfield, Mass.
Milton Kanuan	12 Sheldon Street	Springfield, Mass.
Albert Pevizan	16 Belmont Place	Springfield, Mass.
Herman E. Ishin	151 Sumner Ave.	Springfield, Mass.
Martin Sinclair	70 Wexford Street	Springfield, Mass.
Louis Black	22 Warner Street	Springfield, Mass.
Lloyd Gilman	83 Longhill Street	Springfield, Mass.
Abraham Or	55 Crown Street	Springfield, Mass.
Gerald S. Naidorf	10 Brookline Avenue	Holyoke, Mass.
Harold Haberman	177 Hillside Ave.	Holyoke, Mass.
Mrs. Carl Rudman	91 Carver Street	Springfield, Mass.
Harold L. Rudman	91 Carver Street	Springfield, Mass.
Mrs. Ruth Markowitz	93 Carver Street	Springfield, Mass.
B. Daniels	34 Edson Street	Longmeadow, Mass.
Norris Peilman	137 Shawnut Street	Springfield, Mass.
Janet L. Juros	2-c McNary Street	Westover, AFB, M
K. Mushnitsky	102 Belle Street	Springfield, Mass.
Norman Steinberg	61 Texie Drive	Springfield, Mass.
David C. Wieter	82 Sunset Street	Springfield, Mass.
Mrs. B. Waldman	86 Woodside Terr.	Springfield, Mass.
Robert Miller	39 Spruceland Ave.	Springfield, Mass.
Samuel Cohen	159 Cooley Drive	Longmeadow, Mass.
H. Rosenbloom	61 Pomeroy Avenue	Pittsfield, Mass.
Seymour Rockster	28 Lexington Road	Longmeadow, Mass.
Mrs. M. Kaplan	496 White Street	Springfield, Mass.
Charles Becker	156 Woodlawn Street	Springfield, Mass.
Estelle Fialky	33 Dorset Street	Springfield, Mass.
Leslie Daniels	220 Woodlawn Street	Springfield, Mass.
Pauline Apelbaum	83 Ft. Pleasant Ave.	Springfield, Mass.
Rose Kainson		Turners Falls, Mass

ny Blaisberg		Greenfield, Mass.
ry B. Greenberg	28 Sumner Avenue	Springfield, Mass.
k Faggle	259 Trafton Road	Springfield, Mass.
eph Schulhoff		Athol, Mass.
aham Diamond	84 Burnside Terr.	Springfield, Mass.
ris Hyte	33 Elwood Drive	Springfield, Mass.
uel Seigel	138 Woodlawn Street	Springfield, Mass.
k Gladstone	103 Draper Street	Springfield, Mass.
R. Flesker	168 Prospect Street	Springfield, Mass.
ry Jeinstein	Locust Street	Springfield, Mass.
Lobyman	446 Sumner Ave.	Springfield, Mass.
uters	89 Fox Hill Road	Springfield, Mass.
is Muhaelsm	56 Portland Street	Springfield, Mass.
W. Allen	124 Lecun Drive	Longmeadow, Mass.
ie Beeker	55 Bellin Avenue	Springfield, Mass.
ph D. Grant	18 Lawndale Street	Springfield, Mass.
nard S. Meyer	17 Sumner Avenue	Springfield, Mass.
aham Greenberg	74 Mill Street	Springfield, Mass.
h I. Rosenthal	158 Gillette Ave.	Springfield, Mass.
Morris Akum	849 Dickinson St.	Springfield, Mass.
ed A. Macknee	86 Woodside Terr.	Springfield, Mass.

[1926]

iam Herman	25 Tiffany Street	Springfield, Mass.
David Kern		Springfield, Mass.
nio Aetneli	184 Winton Street	Springfield, Mass.
Lurystone	238 Sumner Avenue	Springfield, Mass.
i W. Roberts	30 Soreny Street	Longmeadow, Mass.
jamin Daniels	125 Woodlawn Street	Springfield, Mass.
Thal	44 Washington Road	Springfield, Mass.
aham Zarr	118 Brunswick St.	Springfield, Mass.
ris Glushein	48 White Street	Springfield, Mass.
ert Kampen	3 Olmsted Drive	Springfield, Mass.
ed Shuthel	38 Leyperd Terr.	Springfield, Mass.
t Tezon	100 Bronson Terr.	Springfield, Mass.
A. Kle	109 Sunset Drive	Springfield, Mass.
Rogow	744 White Street	Springfield, Mass.
n Steinborl	74 Maryland Street	Springfield, Mass.
nor Cowen	1032 Sumner Avenue	Springfield, Mass.
H. Lubman	69 Longhill Street	Springfield, Mass.
den Kagan	72 Allen Road	Longmeadow, Mass.
on Daniels	220 Woodlawn St.	Springfield, Mass.
Klein	899 Worthington St.	Springfield, Mass.
aks	895 Worthington St.	Springfield, Mass.
V. Buck	109 Pineywood Ave.	Springfield, Mass.
g Tariff	70 Keep Road	Springfield, Mass.
hell L. Smith	46 Eckington St.	Springfield, Mass.
rietta Saks	899 Worthington St.	Springfield, Mass.

Mrs. H. Epstein	21 Longfellow Terr.	Springfield, Mass.
M. J. Wall	51 Fort Pleasant St.	Springfield, Mass.
Mrs. H. Rosen	81 Tecumsah Drive	Longmeadow, Mass.
Mrs. Snow	104 Lefed Terr.	Springfield, Mass.
Mrs. Kalen	1594 Dwight Street	Springfield, Mass.
Mrs. Baumer	1706 Dwight St.	Springfield, Mass.
Paul Dusur	27 Bronsin Terr.	Springfield, Mass.
B. Smith	28 W. Allen Ridge Rd.	Springfield, Mass.
Mrs. S. Cohen	92 Leyfred Terr.	Springfield, Mass.
Mrs. Keith Sylvin	1220 Wilbraham Road	Springfield, Mass.
Arthur S. Rivkin	88 Somerset Street	Springfield, Mass.
Mrs. M. Ulise	45 Sylvan Street	Springfield, Mass.
Robert Arler	47 Brookline Ave.	Springfield, Mass.
Louis Rubin	437 Hillside Avenue	Springfield, Mass.
Mrs. M. Birnbaum	132 Groveland St.	Springfield, Mass.
Mr. William Neitz	110 W. Alvord Street	Springfield, Mass.
Libby S. Bogen	105 Olmsted Drive	Springfield, Mass.
Milton Birnbaum	132 Groveland St.	Springfield, Mass.
Leonard J. Allen	17 Remy Ave.	Northampton, Mass.
Florence H. Boher	62 Wood Avenue	Springfield, Mass.
Mrs. Bessie Katz	72 Orlens Street	Springfield, Mass.
Mrs. S. Small	5317 Westwood Ave.	Springfield, Mass.
Mrs. R. Mirkin	2 Webber St.	Longmeadow, Mass.
Yetta Simmons	247 Commonwealth Ave.	Springfield, Mass.
Belle Wolpert	149 Sumner Avenue	Springfield, Mass.
Gloria Bernstein	22 Ferrante Ave.	Greenfield, Mass.
J. Cohen	52 Church Street	Ware, Mass.
L. Sheer	111 Fort Pleasant Ave.	Springfield, Mass.
Joseph S. Lavin	41 Wilken Drive	Longmeadow, Mass.
Samuel Schinoff	122 W. Alvord St.	Springfield, Mass.
Harold Fireson	87 Maryland St.	Springfield, Mass.
Philys P. Ritter	65 Kittenhouse Terr.	Springfield, Mass.
David Simons	215 Woodlawn Street	Springfield, Mass.
Harry Gitting	54 West Alvord St.	Springfield, Mass.
Jack Sack	55 Alsell Street	Springfield, Mass.

[fol. 27]

M. Feinstein	44 Greenwich Road	Longmeadow, Mass.
Rabinowicz	240 Locust Street	Springfield, Mass.
H. Schwartz	76 Olmsted Drive	Springfield, Mass.
M. Weiss.	107 West Alvord Street	Springfield, Mass.
Gidor Kaplan	19 Blodget Street	Springfield, Mass.
Ed Mackle	412 Gillett Avenue	Springfield, Mass.
George Scott	476 Cold Spring Ave.	W. Springfield, Mass.
Elisabeth Rushton	52 Webber Street	Springfield, Mass.
Elinor Rickless	54 Edgewood Ave.	Longmeadow, Mass.
Hayes Rickless	54 Edgewood Ave.	Longmeadow, Mass.
M. Brandeese	91 Longhill St.	Springfield, Mass.

Sidney Resnick	105 Narragansett St.	Springfield, Mass.
W. Millman	975 So. Brandibury St.	Springfield, Mass.
ob C. Rosenfeld	28 Longview St.	Springfield, Mass.
nry A. Black	33 Beechwood Avenue	Springfield, Mass.
bin Kimball	17 Calhoun Street	Springfield, Mass.
ne Fieldman	81 Willsen Drive	Longmeadow, Mass.
rris Gordon	129 Gillett Ave.	Springfield, Mass.
rge I. Levine	94 Tecumseh Drive	Longmeadow, Mass.
ard Grisley	68 Thorndyke St.	Springfield, Mass.
Sanders	70 Moarelift St.	Springfield, Mass.
lyn Searleman	69 Burnside Terr.	Springfield, Mass.
hard Weinberg	257 Cooper Street	Springfield, Mass.
rold Macklin	63 W. Alvord Street	Springfield, Mass.
nuel R. Rothman	63 Park Edge Ave.	Springfield, Mass.
Philip B. Label	152 Linfred Terrace	Springfield, Mass.
han Elyten	133 Elmwood Avenue	Longmeadow, Mass.
tin Lind	177 Cooper St.	Springfield, Mass.
s. Charles Basin	62 Randolph St.	Springfield, Mass.
Barnard	34 Meriden St.	Springfield, Mass.
id Rubin	7 Wiler Avenue	Springfield, Mass.
A. Sinclair	23 Carver Street	Springfield, Mass.
in Young	619 Samuel Street	Longmeadow, Mass.
a Lanoms	99 Carver Street	Springfield, Mass.
lter Berman	140 Woodlawn Street	Springfield, Mass.
ng M. Lazerus	58 Livingstone Ave.	Pittsfield, Mass.
nard Glapin	59 Olmsted Avenue	Springfield, Mass.
rry Shultz	142 Fountain Street	Springfield, Mass.
rill Fein	12 Somerset Street	Springfield, Mass.
alie Pottern	65 Meredith Street	Springfield, Mass.
k Allen	42 Colchester St.	Springfield, Mass.
lma Shrinkas	112 Mark Road	Springfield, Mass.
el Neigher	94 Sylvan Street	Springfield, Mass.
ise K. Learner	117 Firglade Avenue	Springfield, Mass.
lyn Silverman	127 Tecumseh Drive	Longmeadow, Mass.
line Siegel	123 Harkness Avenue	Springfield, Mass.
Finerman	107 Shawmut Street	Springfield, Mass.
ph Reisner	69 Washington St.	Springfield, Mass.
an Zuitsluk	70 Burnside Terr.	Springfield, Mass.
rge Brandwere	460 Laurel Street	Longmeadow, Mass.
land Lile	43 Somerset Street	Springfield, Mass.
id Cowen	1032 Sumner Avenue	Springfield, Mass.
nces Shames	119 Groveland Street	Springfield, Mass.
n Kohn	52 Alsace Street	Springfield, Mass.

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed May 6, 1958

Upon the verified complaint, the plaintiffs move the court as follows:

1. To issue a preliminary injunction suspending and restraining the operation, enforcement and execution of Massachusetts G. L. (Ter. Ed.) c. 136 §§ 5-6, as amended, which are specified in Paragraph 4 of the Complaint in the above-entitled action, pending the final hearing and determination of this cause.

The grounds of this motion as more fully set forth in the Complaint are that:

A. Said laws of the Commonwealth of Massachusetts complained of are invalid.

B. The defendant, unless enjoined, threatens to enforce said laws.

C. Said laws are causing and will cause immediate and irreparable injury to plaintiffs.

D. Unless the operation and enforcement of the laws be restrained pending final disposition of the action, the [fol. 29] injury to plaintiffs in the interim will be irreparable even by final judgment for plaintiffs.

E. No injury will be sustained by the defendant or by the public through issuance of a preliminary injunction.

2. To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory court of three judges at least one

of whom shall be a circuit judge, in accordance with the provisions of § 2284, Title 28, United States Code.

Attorneys for plaintiffs:

Herbert B. Ehrmann, 50 Federal Street, Boston, Mass.;

Irving S. Ribicoff, 64 Pearl Street, Hartford, Conn.;

Samuel L. Fein, 1421 Main Street, Springfield, Mass.

NOTICE OF MOTION—May 6, 1958

To: The Hon. Foster Furcolo, Governor of the Commonwealth of Massachusetts.

The Hon. George Fingold, Attorney General of the Commonwealth of Massachusetts.

Raymond P. Gallagher, in his position as Chief of Police of the City of Springfield, defendant in the above-entitled action:

You and each of you, are hereby given notice pursuant to the provisions of § 2284 of Title 28 of the United States Code, that the United States District Court for the District of Massachusetts, has set for hearing and determination in the Federal Court Room in the Building, in the City of Commonwealth of Massachusetts, on the day of May, 1958, at o'clock in the noon of that day, the application for an interlocutory injunction in the above-entitled action to enjoin the enforcement of §§ 5-6, Massachusetts G. L. (Ter. Ed.) c. 136, as amended, by enjoining the acts of Raymond P. Gallagher, in his official capacity as Chief of Police of the City of Springfield, Massachusetts, his successor in office, and all other Massachusetts and local [fol. 31] authorities who would have any authority to take any action toward the enforcement of said laws, requiring plaintiff corporation to keep its market closed on Sunday, or bringing criminal action against plaintiff corporation, on the ground that said laws violate the Constitution of

the United States in that said laws contravene the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

There is served upon each of you herewith, copies of the Complaint in said cause, Application to the Chief Judge and the order convoking a three judge court for the hearing of said application as provided for by § 2284 of Title 28 of the United States Code.

Dated, May 6th, 1958.

Attorneys for plaintiffs:

Herbert B. Ehrmann, Gou-ton & Storrs, 50 Federal Street, Boston, Massachusetts;
Irving S. Ribicoff, Ribicoff and Kotkin, 64 Pearl Street, Hartford, Connecticut;
Samuel L. Fein, Fein, Cavanaugh & Kimball, 1421 Main Street, Springfield, Massachusetts.

[fol. 32] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT—
Filed May 28, 1958

Now comes the defendant and moves that the Court dismiss the complaint for the following reasons:

1. The complaint fails to allege adequate grounds on which relief can be granted.

2. The complaint fails to allege adequate grounds on which the Court can assert its equitable jurisdiction.

3. The complainants have an adequate redress at law by resort to the courts of Massachusetts.

4. On the face of the complaint, it does not appear that the complainants' liberty or property has been unconstitutionally interfered with by the defendant.

5. The individual complainants are not persons whose activities are regulated by the statute attempted to be drawn in question by the complaint and therefore have no standing to question its constitutionality.

Raymond P. Gallagher, Chief of Police of the City of Springfield, By Matthew J. Ryan, Jr., John J. O'Connor, S. Thomas Martinelli, His Attorneys, Address: City Hall, 36 Court St., Springfield, Massachusetts.

[fol. 33] [File endorsement noted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

PLAINTIFFS' MOTION TO AMEND COMPLAINT—
Filed June 13, 1958

Now come the Plaintiffs and move to amend their Complaint heretofore filed by them by adding the following new paragraph: to be numbered No. 18 (a) following Paragraph No. 18 on Page 5 of the Complaint:

"18 (a) All of the Plaintiffs are residents and citizens of the Commonwealth of Massachusetts, pay taxes to the Commonwealth and to its political subdivisions, and portions of the taxes so paid are used to pay for the enforcement of Mass. G.L. (Ter. Ed.) c. 136, Sec. 5 thereof."

By their attorneys,

Herbert B. Ehrmann, Edward L. LaVine, of Goulston & Storrs, 50 Federal Street, Boston, Mass.

[fol. 33a] Certificate of Service (omitted in printing).

[fol. 34] IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

PLAINTIFFS' MOTION TO AMEND COMPLAINT—
Filed July 11, 1958

Now come the Plaintiffs and move to amend their Complaint heretofore filed by them by adding at the end of Paragraph 20 on Page 5 the following new sentence:

"Unless restrained by this court the Defendant will enforce G.L. (Ter. Ed.) c. 136 Section 5 thereby causing the Corporate Plaintiff's store to close on Sundays except for the hours between six A.M. and ten A.M. for the sale of kosher meat only and not for the sale of other kosher products, an exception which affords no practical relief to the Plaintiffs."

By their attorneys,

Herbert B. Ehrmann, Edward L. LaVine, of Goulston & Storrs, 50 Federal Street, Boston, Massachusetts.

We assent to the allowance of the foregoing motion.

Matthew J. Ryan, Jr., John J. O'Connor, S. Thomas Martinelli, Attorneys for Defendant.

Allowed.

William T. McCarthy, D.J.

[fol. 35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

DEFENDANT'S ANSWER—Filed July 25, 1958

1. Now comes the defendant in the above entitled action and as to each and every allegation contained in paragraphs 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 24 of the complaint, denies that he has knowledge or information thereof sufficient to form a belief.

2. The defendant denies the allegations in paragraph 3 of the complaint.

3. The defendant admits the allegations in the third sentence of paragraph 4 of the complaint but denies that the relief extended by General Laws chapter 136 section 6 to persons who observe Saturday as a Lord's day is severely limited, discriminatory or impracticable.

4. The defendant admits the allegation in Paragraph 19 of the Complaint that he is the Chief of Police of the City of Springfield and charged with enforcing Massachusetts General Laws chapter 136 sections 5 and 6, as amended.

5. The defendant admits the allegation in Paragraph 20 of the Complaint that he has authority to make arrests for violation of State laws and has arrested and prosecuted the manager of the Crown Market, one Harold Chernock, for keeping the store open on Sunday, in violation of Gen-
[fol. 36] eral Laws chapter 136 sections 5 and 6; said prosecution resulting in the conviction of the said Chernock in the Hampden County Superior Court of the Commonwealth of Massachusetts. Said Chernock appealed from the conviction to the Supreme Judicial Court of the Commonwealth of Massachusetts, and in a decision recorded in 1957 Advance Sheets, at page 1057, entitled "Commonwealth vs. Harold Chernock", said convictions were upheld.

6. The defendant admits the allegation in paragraph 21 of the complaint that the plaintiffs have a right under the First Amendment of the Constitution of the United States to the free exercise of their religion and to be protected against the establishment of any particular religion, and that under the Fourteenth Amendment the States are forbidden to make or enforce any law which abridges the privileges or immunities of citizens of the United States or deprive any person of liberty or property without due process of law or denies any person his equal protection of (sic)
The defendant admits that Section 1983 of Title 42 U. S. C. is as set out in the complaint. The defendant denies that General Laws (Ter. Ed.) chapter 136, sections 5 and 6, as amended, are unconstitutional and of no legal effect, and says that said laws are constitutional and are in full force and effect. The defendant denies that he has knowledge or information as to the allegations in subparagraphs (A), (B), (C) and (D) of paragraph 21 of the complaint, and the defendant denies the allegations in subparagraphs (E), (F) and (G) of paragraph 21 of the complaint.

7. The defendant admits the allegation in paragraph 22 of the complaint as to a controversy between the plaintiff Crown Kosher Super Market of Mass., Inc. and denies that he has knowledge or information thereof sufficient to form a belief as to whether or not there exists a controversy between the individual and representative plaintiffs and himself, and further answering the defendant says that by a bill in equity filed in the Hampden County Superior Court of the Commonwealth of Massachusetts [fol. 37] the Crown Kosher Super Market of Mass., Inc. sought injunctive relief against the defendant from prosecution under General Laws (Ter. Ed.) chapter 136 sections 5 and 6 and that on June 25, 1954 an interlocutory decree was entered in said court; continuing in force a restraining order issued under the first prayer in said bill. This interlocutory decree was continued in force by agreement of the parties, pending the disposition of the appeal of

Harold Chernock in the criminal case heretofore mentioned and is still continuing on the date that this answer is filed.

8. The defendant denies the allegation in paragraph 23 of the complaint and says that the plaintiffs have an adequate remedy at law, particularly in view of the restraining order of the Hampden County Superior Court of the Commonwealth of Massachusetts, which is still in force, restraining the defendant Raymond P. Gallagher from enforcing General Laws chapter 136 sections 5 and 6.

9. And further answering the defendant says that he is informed and believes, and therefore avers that the petitioner, Crown Kosher Super Market, sells food of various descriptions, other than Kosher food, and therefore denies that if this law is enforced the Crown Kosher Super Market will lose approximately one-third of its gross business.

10. And further answering, as to the allegations in paragraph 18A of the plaintiffs' amended complaint, the defendant denies that he has knowledge or information thereof sufficient to form a belief.

Raymond P. Gallagher, Chief of Police of the City of Springfield, By Matthew J. Ryan, Jr., S. Thomas Martinelli, John J. O'Connor, His Attorneys, Address: City Hall, 36 Court Street, Springfield, Mass.

[fol. 38] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC., Corporate Plaintiff, et al.,

vs.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS —June 12, 1959

This cause came on for hearing on Defendant's Motion to Dismiss the Complaint, and after hearing counsel and upon consideration thereof, it is ordered, adjudged and decreed that Defendant's Motion be and the same is hereby:

Denied.

Dated: 12 June 1959

Calvert Magruder, Peter Woodbury

[fol. 39] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

[Title omitted]

STIPULATION AS TO FACTS—Filed November 13, 1958

The parties to the above-entitled suit hereby stipulate as follows:

I. Unless restrained in these proceedings, the defendant will enforce the provisions of Mass. G.L. (Ter. Ed.) c. 136 to the full extent of his authority.

II. There is no case now pending in the state courts of Massachusetts against the corporate plaintiff or its Manager, Harold Chernock, involving the enforcement of Mass. G.L. (Ter. Ed.) c. 136 or by either of them to stay proceedings under said Act.

The corporate plaintiff's Manager, Harold Chernock, was convicted by the District Court of Springfield for keeping open a shop on Sunday in violation of G.L. c. 136 at the address of the corporate plaintiff; the said Chernock appealed to the Superior Court for Hampden County and was convicted after trial. Thereafter, the said Chernock took his exceptions to the Supreme Judicial Court of Massachusetts. These exceptions were subsequently overruled in an opinion, *Com.* v. *Chernock*, Mass. A.S. 1057 on November 13, 1957.

After the proceedings in the District Court of Springfield, the corporate plaintiff filed a bill in equity in the Superior Court of Hampden County to restrain Raymond [fol. 40] P. Gallagher, Chief of Police of the City of Springfield, from serving further complaints upon the petitioner until such time as the case of *Com.* v. *Chernock* had been decided. The court issued such a preliminary injunction. Following the decision in *Com.* v. *Chernock*, a final decree was entered dismissing the bill in equity.

III. For purposes of these proceedings only, the following supplemental factual allegations are true:

A. *Concerning Orthodox Judaism.*

Orthodox Judaism is one of the three great branches of Judaism in our country. The other divisions are known as "Conservative" and "Reform". Followers of the Orthodox faith are distinguished from the others by their strict observance of the tenets and practices of traditional Judaism. Followers of the Conservative faith include many who are also strict observers of traditional Judaism, especially with respect to keeping a Kosher household.

Included in practices of all Orthodox Jews and many Conservative Jews are the following:

1. *Strict Observance of the Sabbath.*

In all branches of Judaism, the Sabbath begins at sundown on Friday and ends at sundown on Saturday. Dur-

ing the course of the year, there is a variance of approximately four hours in the time of observing sundown. This means that in each week the Sabbath begins and ends at changing times.

Although all members of the Jewish faith reverence and observe their Sabbath to some extent (including some of the observances hereinafter mentioned), the following are characteristic of the observances of all Orthodox and many Conservative Jews:

During the Sabbath hours, they do not conduct business, nor do they buy or sell for commercial or personal pur- [fol. 41] poses. They do not ride in automobiles or carriages. Although permitted to walk, they are sharply limited as to distance.

They do no cooking on the Sabbath. All food to be eaten on Friday evening and on Saturday is prepared on Thursday or Friday.

Friday evening is in the nature of a family festival. The meal is traditionally the best meal of the week. It is marked by a weekly family get-together, the lighting of candles and special Sabbath prayers. It is a sacred and joyous occasion for giving thanks to the Lord for his blessings and for the promotion of family affection and solidarity.

Saturday morning is marked by extended Sabbath services in the synagogues. The close of the Sabbath on Saturday is frequently marked by a general gathering of members of the congregation at the synagogue for socializing in celebration of the Sabbath.

2. *Dietary Regulations.*

The dietary regulations followed by Orthodox and many Conservative Jews are quite complex. They go far beyond the matter of ritual slaughter and the prohibition of pork products, which are the dietary laws best known to the general public. Only certain types of fish and fowl may be eaten. In no case may any dairy products be eaten with or mingled with meat products. No packaged food may be eaten which contains such a mixture or which utilizes pork products such as lard. The duty of supervising the food purchased by Orthodox Jews is imposed upon the Chief Rabbi of the area assisted by a number of inspectors. The

Rabbi or his inspectors visit the Kosher groceries and butcher shops daily except Saturday. They check the food offered for sale, both raw and packaged, to ascertain whether it complies with the laws of Kashruth (Kosher). When fresh meat is approved, the inspector impresses a [fol. 42] date stamp upon it. Fresh meat may not remain for more than seventy-two hours without water. Since the Crown Market is closed from sundown on Friday to Sunday morning, the Rabbi or one of his inspectors, in any event, must visit the Market to ascertain that meat which arrived on the preceeding Thursday or earlier is re-washed on Sunday. A statement of some of the dietary laws and procedures is contained in a publication known as "Kashruth", published by the Union of Orthodox Jewish Congregations of America and Rabbinical Council of America which may be shown to the court or introduced as an exhibit.

3. *Hospitality.*

Among Orthodox Jews there is the tradition of extending hospitality to transient Jews in the community. These travelers or transients apply to the Rabbi who then sends them to the homes of members of his congregation where the guests find a traditionally Jewish home. The Plaintiffs, Chaitovsky and Heafitz, are among those on whom the Rabbi relies for this service. These guests arrive at unexpected times, and when this happens, there may be an unanticipated need to secure additional Kosher food immediately.

4. *Prayers.*

Orthodox Jews recite prayers three times a day,—in the morning, in the afternoon and in the evening. Sometimes these prayers are said in the home and sometimes in the synagogues. The total time required is approximately one and one-half hours.

B. *Concerning Customers of Crown Market who keep Kosher Households.*

Orthodox and observing Conservative Jewish customers of the Crown Market make no purchases of any kind between sundown on Friday and sundown on Saturday. Even

[fol. 43] if there were any Kosher supplies available for sale during these hours, they would not buy them. They do their cooking on Friday for the Friday evening meal and for the Saturday meals, because they do not cook on the Sabbath. They usually complete their purchases of food for the week-end by Thursday night.

Herbert B. Ehrmann, Attorney for the Plaintiffs.
Joseph H. Elcock, Jr., Attorney for the Defendant, Assistant Attorney General.

[fol. 44] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

[Title omitted]

SUPPLEMENTAL STIPULATION AS TO FACTS—
Filed November 14, 1958

The parties to the above-entitled suit hereby stipulate as follows:

The Plaintiffs, Irving Heafitz, Morris Chaitovsky and Ruth B. Cohen are Orthodox Jewish customers of the Crown Kosher Super Market in Springfield. Plaintiffs Heafitz and Chaitovsky are residents in the City of Springfield and Plaintiff Cohen a resident of Turners Falls, Massachusetts.

Herbert B. Ehrmann, Attorney for Plaintiffs.

Joseph H. Elcock, Jr., Attorney for Defendant, Assistant Attorney General.

[fol. 45]

GOULSTON & STORRS
COUNSELORS AT LAW
50 FEDERAL STREET
BOSTON 10

November 14, 1958

Clerk
U. S. District Court
Federal Building
Boston, Massachusetts

Re: Crown Kosher Super Market of Mass., Inc.

vs.

Raymond P. Gallagher
C. A. 58-471-M

Dear Sir:

I am enclosing herewith quadruplicate copies of supplemental stipulation as to facts in the above case duly signed by counsel for both parties. This paragraph is inadvertently omitted as the opening paragraph of III B beginning at the bottom of Page 4 of the stipulation filed yesterday.

Very truly yours,

Herbert B. Ehrmann

HBE:acl
Enclosures (4)

[fol. 46]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. #58-471-M

Magruder, Ch.J. and Woodbury, CJ. and McCarthy, DJ.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., et al.,

v.

RAYMOND GALLAGHER, Chief of Police of Springfield.

Transcript of Stenographic Record on Motion to Dismiss

APPEARANCES:

Herbert B. Ehrmann, Esq., Samuel L. Fein, Esq., David Kotkin, Esq., and Edward L. LaVine, Esq., for the Petitioner.

Matthew J. Ryan, Jr., Esq., for the Defendant.

Joseph H. Elcock, Jr., Assistant Attorney General, for the Commonwealth.

S. Thomas Martinelli, Esq., for Springfield.

Southern New England Conference of Seventh Day Adventists, by Howard S. Whiteside, Esq.

Archdiocesan Council of Catholic Men, by Henry Leen, Esq.

Court Room No. 5
Federal Building, Boston, Mass.
Thursday, Nov. 13, 1958; 11 a.m.

[fol. 48] COLLOQUY BETWEEN COURT AND COUNSEL

Magruder, Ch.J.: We set this case down for hearing on the motion to dismiss as well as final hearing on the allegations of the complaint. Now I don't know whether counsel have discussed among themselves the desirable order of precedence in speaking. It doesn't make any difference to me. Have you any ideas about that, Mr. Ehrmann?

Mr. Ehrmann: Well, sir, I should think we would follow the usual course, that is, that on the motion to dismiss the mover would address the Court first, and on the merits we will present a stipulation and offer some slight evidence and rest, and then I would assume, unless the Commonwealth has other evidence to offer, the Commonwealth would rest, and then counsel for the Commonwealth would address your Honors first.

Magruder, Ch.J.: Well, then, that is satisfactory to me. Will you proceed on the motion to dismiss, Mr. Elcock?

Mr. Elcock: Yes.

McCarthy, DJ.: Haven't we two parties here, the City of Springfield represented by the corporation counsel—

Mr. Elcock: Your Honor, we have an appearance in this matter on behalf of the Governor of the Commonwealth and on behalf of the Attorney-General. There is also an appearance by other counsel, Mr. Martinelli, City Solicitor, entered on behalf of the defendant. We appear because of the interest of the Commonwealth in enforcing the statutes of the Commonwealth. We appear also at the request of Mr. Gallagher, the defendant in this matter. So, if the City Solicitor is not here, I think it would not be [fol. 49] out of order for us to proceed.

Magruder, Ch.J.: Well, I think so. I think you should proceed. Will you first proceed on the motion to dismiss.

Mr. Elcock: Yes, your Honor.

Magruder, Ch.J.: All right, go ahead.

McCarthy, DJ.: May I then parenthetically clear up the record? When you say you appear for Mr. Gallagher, you appear for Mr. Gallagher in his representative capacity as Chief of Police of Springfield. Isn't that right?

Mr. Elcock: That would be so; but I have filed, your Honor, up to the present time, no appearance in that capacity.

McCarthy, DJ.: I think I see counsel for Springfield now in the back of the room.

Mr. Elcock: Are you from Springfield?

Mr. Martinelli: Yes.

Mr. Elcock: That is how I understood it.

Magruder, Ch.J.: I was just asking the Attorney General's Office to proceed with the argument on the motion to dismiss. Do you want to be heard on that, counsel for the City?

Mr. Martinelli: I don't know what has transpired, your Honor.

Magruder, Ch.J.: Well, nothing has transpired. He is getting ready to talk. We haven't said anything important.

Mr. Martinelli: May I confer with Mr. Elcock?

[fol. 50] Magruder, Ch.J.: Yes.

McCarthy, DJ.: I would like to say in open court, that the Court allowed Mr. Leen and my friend here in front to appear, each one, as amicus curiae; and I think, where you appear as amicus curiae, I don't think you should sit at counsel table with Mr. Ehrmann, any more than I think Mr. Leen should sit with the Attorney General of the Commonwealth.

Mr. Ehrmann: May I say, first, that I would certainly have no objection to distinguished counsel like Mr. Leen sitting with counsel for the defendant, and if the Court has any objection to Mr. Whiteside sitting with me, I certainly am not going to make an issue of it.

McCarthy, DJ.: He had full opportunity to file a brief, and I think, as it strikes me—I am only speaking for myself—proper procedure would certainly necessitate the opinion he shouldn't be at the bench any more than Mr. Leen should.

Mr. Ehrmann: I'll be very happy to have Mr. Leen with counsel or anybody else he wishes to.

Magruder, Ch.J.: I don't care what you do. You can sit where you please as far as I'm concerned.

McCarthy, DJ.: Mr. Leen may sit with the Attorney-

General. Isn't that right? If he cares to. Would you care to sit with the Attorney-General, Mr. Leen?

Mr. Leen: I'm very happy to sit right here where I am [fol. 51] at the present time.

Mr. Ehrmann: Let me say that Mr. Whiteside is here at my reque. My associate, unfortunately, who is with me on this case, couldn't come, and I asked Mr. Whiteside if he wouldn't sit next to me and possibly pull my coat tails when I needed it, but I certainly am not going to insist on it if your Honor objects.

McCarthy, DJ.: Don't you think you should have consulted the Court about that?

Mr. Ehrmann: Well, I'm yielding to the Court now. [To Mr. Whiteside] I think it would be best if you didn't sit here.

Mr. Whiteside: Very well [withdrawing].

Magruder, Ch.J.: Will you proceed. Have you decided what you want to do?

Mr. Elcock: Yes, your Honor. I will present the argument on the motion to dismiss.

Magruder, Ch.J.: All right, go ahead.

Mr. Elcock: And my brother, unless I omit something, will not address the Court at the present time.

The Court: All right. Go ahead.

STATEMENT BY MR. ELCOCK

Mr. Elcock: The motion to dismiss, your Honors, has been presented particularly in connection with the exercise of jurisdiction by the Federal Court. I don't think there is any contention that the Federal Court per se lacks juris- [fol. 52] diction. So we believe, your Honors, that this, although it purports to be a proceeding under the Civil Rights Act, is not technically a suit under the Civil Rights Act where they are attempting to seek damages, it is not technically an action at law in the Federal District Court: it is, however, a proceeding in the nature of an equitable remedy.

The plaintiff in this particular matter has filed a petition alleging, in effect, that certain statutes of the Commonwealth of Massachusetts regulating the observance of Sunday as the Sabbath, are unconstitutional, in that those

statutes affect the right of certain parties who have a religious belief along the lines of the orthodox Jewish faith. To that extent, your Honors, they are asking this Court in a bill in equity to restrain the Chief of Police of the City of Springfield from enforcing the provisions of that statute. They are seeking, in effect, to have the Federal District Court enjoin the prosecution of a criminal statute by a state official. Hence we would say that they are seeking, then, equitable relief; they are not seeking damages in an action at law as provided in an ordinary civil action. To that extent, your Honors, we believe that it is the fundamental policy of this Court, as it would be of any court in equity, to act only in the event that there is an inadequate remedy at law.

There have been cases, your Honors, presented to this court, where the court has declined to exercise its equitable [fol. 53] jurisdiction, on the ground that there was an adequate remedy in the State Court for purposes of protecting the rights of the petitioners, namely, the petitioners in this particular proceeding.

There is also a concept in the Federal cases to the effect that equitable jurisdiction of the court should not be exercised unless it appears there was fear of immediate and irreparable injury to the plaintiff. In other words, if there is an adequate remedy at law in the State Court it may still not be a sufficient remedy in the sense it would take too long for the State Court to act on that statute, or to decide whether it is constitutional or not—and an equity in the Federal Court should exercise its jurisdiction.

So that we would say, No. 1, there is an adequate remedy in the State Court in the sense that there is a criminal statute for breach of which the petitioner, Crown Kosher Super Market of Massachusetts, Inc., could well be prosecuted criminally, and some of the other parties in here such as the manager who signed it and people who might act; so there is an adequate remedy whereby the constitutionality may be tested.

The next step is, is there a danger of irreparable injury at the present time so that equity in this court should step in? And we would argue, your Honors, that there is no showing on this petition, or in any surrounding facts

which would be available to the Court, to indicate any such [fol. 54] irreparable injury.

And I would call the Court's attention to a decision in the Massachusetts courts and ask it to take judicial notice of it, cited in my brief—excuse me, your Honors. If someone has mislaid it. Oh, excuse me, I have it here. It is cited in my brief, your Honors, on page 1—Commonwealth v. Chernock, 1957 Advance Sheets 1051; and I will ask the Court to take judicial notice of that case as a determination of the Supreme Judicial Court of the Commonwealth of Massachusetts. And I would call that case to the attention of the Court as indicating lack of any need for immediate action on the part of this Court and lack of irreparable injury.

Woodbury, CJ.: Was there any Federal question raised in that Chernock case?

Mr. Elcock: No, your Honor, there was not.

Woodbury, CJ.: Apparently from the opinion there was not, and I wondered whether the Supreme Judicial Court just passed over the constitutional question.

Mr. Elcock: It wasn't raised.

Woodbury, CJ.: Oh, it wasn't raised at all?

Mr. Elcock: As far as I know it wasn't raised; and we would contend that the parties here had the opportunity to raise constitutionality. Our Supreme Court many times had decided Federal constitutional questions; in fact, your Honors, right under Chapter 136 as recently as a year or [fol. 55] two ago in the Chernock case, cited in my brother's brief, I have a copy of it here.

Magruder, Ch.J.: On this equitable doctrine of adequate remedy at law, it seems to me I have seen several cases that say that means an adequate remedy at law in the Federal courts, not in the State courts.

Mr. Elcock: Undoubtedly, your Honor. If the only action available to a man is an action at law in the Federal Court, then the Federal case would say they would have to look at the Federal law to see if there is any adequate remedy at law in the Federal Court; but if we are dealing with a situation where it is a state action which is involved, then we would have to look to the State Court.

Magruder, Ch.J.: Have you any authority for that?

Mr. Elcock: I would call the Court's attention to that case of Spielman Motor Co. v. Dodge, where they did discuss a State statute. That is the first case cited in our brief. I have additional ones on page 2 of the brief which deal with the general problem, and these are cited in connection with a remedy in the State Court. I would also call the Court's attention to a decision in this District Court. Now perhaps a decision by a single justice would not have any effect in connection with this 3-Judge Court, but a year or two ago, your Honors, in the case of Pictures against the Commonwealth there was dismissed on the ground that there was an adequate remedy at law in the [fol. 56] State Court for purposes of testing the validity and constitutionality of a state statute.

Now I cannot deny, your Honor, that there are Federal cases saying to look to the Federal Law to see if there is an action; but I also say there are cases where you may look at the State Law to see if there is any available remedy.

McCarthy, DJ.: What relationship does Chernock bear to the petition here?

Mr. Elcock: I was attempting, your Honor, to point that out. The petitioner Chernock in that case is the manager of the Crown Kosher Super Market. Chernock is the man who has verified this complaint. Chernock is the man who actually operates that store there, and he is one of the persons in here alleged to be the manager of these stores. So that, in effect, he would be one of the parties that would be injured as far as religious rights are concerned, if any, in connection with Crown Kosher Super Market, because the Crown Kosher Super Market obviously doesn't have a religion in and of itself, and it would be the employees, stockholders, and so forth who are alleged in the complaint. And there is a stipulation, which I don't know whether Mr. Ehrmann has introduced or not, where the facts concerning the State Court proceeding have actually been recited.

Your Honor, assuming that there is authority, as I have cited in my brief, an adequate remedy in the State Court [fol. 57] would be a ground for causing the Federal Court to refrain from exercising any jurisdiction which it may

have, I would then call the Court's attention to the fact that this matter has already been tried in the State Court, in that Chernock case to which reference has been made previously and there has been a determination; and, as has been pointed out, the question of Federal constitutionality was not there raised, but we would say there was an opportunity to raise it and a failure to do so.

Now a mere failure, your Honors, to invoke a defense which would be available to one proceeding certainly is not a ground for saying in equity you should be able to go in and attack collaterally that determination because you forgot to raise the defense that was then available to you.

Magruder, Ch.J.: Are you suggesting that the Chernock case is res adjudicata of this case?

Mr. Elcock: Absolutely, your Honor. It is res adjudicata in the sense that one of the parties here—there are several, separate states of fact as to all parties but as to the issue of— ~~No,~~ I take it back. I don't want to say this is res adjudicata in the strict sense of the word. I would say, your Honor, that there is certainly an estoppel by that case; so that any ground in equity whereby the plaintiff could claim that this court, because of irreparable injury, could restrain and enjoin, is wiped out by the fact that they had their opportunity in the State Court, they went all the way to our State Supreme Court, and any [fol. 58] equitable rights they had now in this court have gone by virtue of the fact they had an opportunity in our State Court. And they had an opportunity to go from our State Supreme Court to the United States Supreme Court on certiorari, where the question of Federal constitutionality might well have been raised.

Magruder, Ch.J.: Well, you seem to me to be making a statement that involves the concept of res adjudicata. I don't see that the plaintiff in the Chernock case is a party here, is he? Where is he mentioned in the complaint?

Mr. Elcock: Well, I call your Honor's attention to the last statement in the complaint where, "I, Harold Chernock, being duly sworn, depose and say I am President and General Manager for Crown Kosher Super Market, Inc.," and he has verified the allegations in the complaint.

I would call the Court's attention to Paragraph 6 of the petition, where it says "because of the religious convictions of the corporate plaintiff stockholders, officers and manager, because of religious convictions it is closed at sundown Friday." And I would say the corporate plaintiff, your Honor, certainly would have to incorporate, even include within it, the officers, managers, and stockholders as being the ones whose religious convictions and rights, if any, have been affected; and to the extent that no stockholder, no manager, or no officer of that corporation would be within this category of a person who would like to celebrate the Sabbath on the seventh rather than on the first day—then we would say the Crown Kosher Super [fol. 59] Market would have no standing.

McCarthy, DJ.: Let me ask you this. Are these Sabbath Day laws, so-called, nominal business statutes?

Mr. Elcock: I would say, your Honor, that they are.

McCarthy, DJ.: Well, was not the manager of this particular store that is involved here—wasn't Chernock the manager?

Mr. Elcock: Chernock, yes, sir, your Honor.

McCarthy, DJ.: And on the basis of the fact that this was the corporation, couldn't all these others that have been named in the—couldn't the Crown Kosher Super Market of Massachusetts have been named in the criminal complaint?

Mr. Elcock: Oh, certainly. No question, your Honor, that the corporation if it violated the State statutes could well be prosecuted. As a matter of fact, as I say, I don't believe Mr. Ehrmann has filed a stipulation. I had assumed when I signed it it would be available. If it is not available—

Mr. Ehrmann: Well,—

Magruder, Ch.J.: The only reason he hasn't filed it, because he hasn't gotten up yet and he asked you to speak first on the motion to dismiss which I presume may be based upon the pleadings rather than the evidence.

Mr. Ehrmann: That is right.

Mr. Elcock: Yes, your Honor; and I will restrict it to pleadings. But from the pleadings, on the face of them, [fol. 60] where Chernock has signed this petition, where

the manager is alleged to be one of the parties injured, where they purported to be bringing it in behalf of these other parties who are injured, where they claim that this is a class suit, where they purport to represent persons of this faith—I think there is no question but that the rights of Chernock would be here represented. I would also point out that in that Massachusetts case the proceeding was against Chernock also, doing business as Crown Kosher Super Market. So whether it was operating under a corporate guise or individual guise on a particular day, your Honor, would be a little bit difficult to ascertain. But for the purpose of this proceeding I would call attention to it only to point out the equities of the situation, because I am addressing the motion to dismiss, your Honors, to the equities; and, as I have indicated, if there is an adequate remedy in the State Court, ordinarily this court will decline jurisdiction, unless there is irreparable injury or undue hardship or a necessity for immediate action; and we say, your Honors, there is no such immediate necessity because of these proceedings in the State Court where Crown Kosher Super Market through its manager could have raised the point and the parties would certainly have gone to the U. S. Supreme Court to have the matter determined.

Woodbury, CJ.: What about the individual parties, the customers and all that; where do they come into your argument?

[fol. 61] Mr. Elcock: I think, your Honor, that if this matter had been determined by the State Court and could have been brought to the Supreme Court, then anybody that would be bound by it in the sense of res adjudicata would be precluded. I don't think that the particular customer of the store would be bound in the sense of res adjudicata, in that if they were subsequently prosecuted for a violation—

Woodbury, CJ.: Could you prosecute them? Is it illegal under Massachusetts law for a buyer to buy?

Mr. Elcock: Well, I would assume it is illegal to enter into a contract on Sunday, your Honor. If there is a purchase and sale agreement it might well be a contract.

Woodbury, CJ.: It might vitiate the contract but is it a criminal offense?

Mr. Elcock: Anyone who carries on labor or business on the Lord's Day would be violating Section 5.

Magruder, Ch.J.: Read the statute to me. Where is it? The statute we are interested in.

Woodbury, C.J.: It says something about keeping open a shop, something like that.

Magruder, Ch.J.: Where is the statute?

Mr. Elcock: 136, Section 5, your Honor, reads as follows:

> "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, [fol. 62] business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars."

Mr. Ehrmann: I suggest that counsel read the first line of the next paragraph.

Mr. Elcock: Unless I am mistaken, I will tell Mr. Ehrmann there is no first line of the next paragraph.

Mr. Ehrmann: I have it here.

Magruder, Ch.J.: Does the complaint set forth the statute you are attacking? I must have it here somewhere.

McCarthy, DJ.: I think it does.

Mr. Elcock: It is the next section.

[Counsel confer.]

Mr. Ehrmann: You have read—

McCarthy, DJ.: Not now, Mr. Ehrmann. I think you ought to be heard later on.

Mr. Ehrmann: Well, I spoke in order that there be no confusion. You've got a later section, and there is another sentence.

McCarthy, DJ.: Is there another sentence?

Mr. Elcock: No, your Honor. In another section of the law there may be other clauses, but the whole of Section 5 is a single sentence which I just read to you.

Mr. Ehrmann: All right.

Magruder, Ch.J.: Section 6 is incorporated in Exhibit [fol. 63] A of the complaint, I think.

Mr. Elcock: Yes, your Honor. There are many exceptions. I will digress for just a moment from the equities and perhaps mention the substance of the statute in order

to show the rights of the parties and the possible equities that may flow therefrom. And we could find out, your Honor, in that connection, that there are many exceptions to the blank prohibition set up in Section 5, some of which have been argued in the brief and many have not.

Section 6 allows the opening of certain shops; the selling of certain foods as may be necessary and the selling of drugs; the publishing of newspapers. It contains many, many exceptions to the general rule. And in this particular case, your Honors, there is also a specific exception on behalf of the persons who are of the persuasion of the Orthodox Jewish religion, in the sense that they may actually open their stores on Sundays between the hours of 6 in the morning and 10 for the purpose of selling Kosher meats. There is also an exception, your Honors, a fairly broad one—

> "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, [fol. 64] if he disturbs no other person thereby."

To that extent, your Honors, we must say that if someone is able to bring the stuff within those exceptions such as one of these other persons of the—

Magruder, Ch.J.: Well, are you suggesting these complainants have not violated the statute?

Mr. Elcock: Oh, I am not, in any sense.

Magruder, Ch.J.: What is the use of talking about the exceptions, then?

Mr. Elcock: Well, they have—

Magruder, Ch.J.: If they are not within the exceptions?

Mr. Elcock: Some are and some are not. I believe I was asked whether some of the other plaintiffs who might be customers could possibly be prosecuted, and I said, under 5, yes, unless they came within the exceptions.

Magruder, Ch.J.: The chief complainant, the corporation, the Crown Kosher Super Market, Inc., that is in violation of the statute, you say?

Mr. Elcock: Yes, and for this reason, your Honor. What they did is, open up a store to sell not only kosher meats

but all sorts of grocery products, and they opened up on Sunday, not only between the hours of 6 and 10, but any other hours they wanted. And here is the difficulty. They conducted their shop, not in connection with those who [fol. 65] conscientiously observe the seventh day, but they sold to anybody who wanted to walk in the door. They were open to the general public. They carried on and made contracts with members of the general public, many of whom would have had no such protection as the statute purports to give here—to the extent that if the Crown Kosher Super Market had observed the provisions of Section 6, your Honor, they had a perfect right to stay open under this statute. The trouble is, they went way beyond the exception which was given to them.

I think, your Honor, that is perhaps getting into the argument of the constitutionality of the statute, whereas at the moment what I was attempting to do was to show that there was no inequity on these plaintiffs; and I would say now—

Magruder, Ch.J.: Well, one of the grounds of your motion is, that on the face of the complaint it does not appear the complainant's liberty or property has been interfered with.

Mr. Elcock: Well, I have more than one argument.

Magruder, Ch.J.: That is an assertion in your present motion to dismiss that gets you into the constitutionality argument, I suppose.

Mr. Elcock: Well, there is no doubt of that, your Honor. I was raising the point on equity, and I was also raising the point, that on the face of the complaint it would appear the statute is not unconstitutional; and, perhaps in the interest of proceeding with the argument as the Court might desire, I will address myself more specifically to that [fol. 66] ground of the motion to dismiss, namely, that on the face of the complaint the statute is not unconstitutional.

Assuming, your Honors, for the purpose of the argument that the equities of the situation would demand that this Court step in and exercise its jurisdiction, we would then have to go to the second point. Is there a statute called to the Court's attention which would be unconstitutional

in respect to the rights of the particular plaintiffs who are here complaining?

The statute, your Honors, is, as I have read, prohibitive of activities on the Lord's Day. The Lord's Day has been interpreted to be Sunday. And it prohibits all sorts of business and trade on that day, and then has various exceptions in Section 6. And we would call attention, your Honors, to a case cited in the brief, a Massachusetts decision, which has been cited not only by myself in the brief but by Mr. Ehrmann. That is the case of *Commonwealth* v. *Has*, 122 Mass. 40, cited on page 2 of our brief. In that case, your Honors, there was a discussion by the Massachusetts Supreme Court of the nature of the law as it prohibits activities on Sunday; and it was the opinion of the Supreme Court of Massachusetts, that the statute was one designed to provide for civil regulation of one day in the week whereby people should refrain from work on that particular day. There was a violation of that particular statute where a man purported to open up his shop [fol. 67] and sell for all purposes, such as the Crown Kosher Super Market did in this particular case. They didn't purport to limit their sales; they had a general shop opened up where they sold all kinds of products to all persons who would come there. And the Court under that case reached the conclusion that the statute was constitutional; and they based it on the ground that it was within the police powers of the Commonwealth to have a statute passed which would set aside a day in the week for purposes of requiring rest from work. It also, of course, would have the result of allowing people to carry on such activities on the Lord's Day as they would desire—to the extent that they would be able to go to church, that they would be able to stay at home if they desired, that they would be able to be with their families—that they would, in effect, stay away from work as such and carry on the other activities of life which would lead to a richer enjoyment of life here on earth. In that sense a Sunday law has been recognized in Massachusetts on that basis.

Now, as I understand the petition, the claim of the petitioners, they assert, in effect, that this statute is directed

only to the regulation of religion; and they would point out that if a statute purports to regulate religion, then it violates the rights of various individuals because no statute, Federal or State, could be enacted under the Federal Constitution which would have for its purpose the regulation of the promotion of religion.

[fol. 68] With that I cannot disagree. You cannot set up one statute regulating the Christian faith or regulating the Jewish faith or regulating whatever other denomination may be in existence. On the other hand, the mere fact that a day is set aside where business is prohibited does not, in my estimation, have anything to do with the regulation of how this religion or that religion or the other religion is carried on. There is no prohibition in the statute which relates to religious observances. The religious observances of all sorts may be carried on on Sundays. And, in connection with them, there are exceptions in the statute whereby, if it is not business but it has to do with religion or recreation or something of that sort, they allow all sorts of exceptions. You may have bands and things of that sort, you may do all kinds of things which are not particularly of a business nature, but would help to promote the general welfare, and one way to promote the general welfare is to promote an atmosphere where religion may thrive or, if a person doesn't desire to participate in religion, where they would be free to do as they pleased.

It is our contention, your Honors, that this statute does not purport to regulate either the Christian religion or the Jewish religion or any other. As the petition itself points out, the religious observance of the particular parties is something of extreme importance to them and rightly so. It points out that many of their activities of a re-[fol. 69] ligious nature take place on Saturday; and I cannot see any clause whatsoever in the Massachusetts statutes that would affect in any way the rights of these particular parties to carry on their religious activities on Saturday, nor is there any prohibition to their carrying on religious activities on Sunday. To that extent, your Honors, this is not a statute directed at the control of religion, nor is it a statute which would force any group to

participate in religious observances of any kind. To that extent I believe that any attack on it from a religious point of view, that it is a regulation of religion, is not a proper attack.

This problem has been to the Supreme Court, your Honors, certainly not in a factual matter very close to what we have here. My brother in his brief has pointed out a situation which was fairly close but was not actually decided by the Supreme Court because it went out on a motion to dismiss. So I think, in all fairness, perhaps there is nothing precisely on the point in connection with this observance of Saturday.

However, your Honors, I would call attention to a case cited in my brief, also cited in the brief of Mr. Ehrmann, the case of *Hennington* v. *Georgia*, appearing on page 3. That case, your Honors, was one relating to a Georgia statute which prohibited the operation of freight trains on Sunday. Now, obviously the prohibition of the operation of freight trains on Sunday would inconvenience persons, [fol. 70] it would inconvenience many people; it would also interfere with certain Federal rights—it would interfere with interstate commerce. In spite of that the United States Supreme Court said that it was within the police powers of the State of Georgia to enact a statute prohibiting all activities on Sunday.

Now I grant you, your Honors, that that is not a case having to do with religion but it is quite clearly a case where the power of a State Court under the police powers to set aside one day whereby no business may take place, even though it would interfere with Federal rights,—it is certainly a case which decided that proposition. To that extent, your Honors—

Magruder, Ch.J.: What case is that you refer to? What case are you referring to?

Mr. Elcock: *Hennington* v. *Georgia*, 163—

Magruder, Ch.J.: Is that on your brief?

Mr. Elcock: Page 3, your Honor.

My brother cited it on his brief and says it doesn't need any explanation. Well, I agree. I don't think it is a question of religion. It is a question whether a State can properly exercise its police power.

Now that carries one further point. Assuming—

Magruder, Ch.J.: If you take thi statute as a whole, I don't understand the theory of some of these so-called exceptions. Why should there be an exception to the sale of ice cream, for instance, or gasoline?

Mr. Elcock: Well, I can't purport, your Honor, to tell [fol. 71] you why there should be that exception.

Magruder, Ch.J.: Or the transportation of livestock be permitted?

Mr. Elcock: I can certainly suggest that since it is a regulation of—

Magruder, Ch.J.: Or the sale of wholesale dressed poultry?

Mr. Elcock: Well, there must be some reasonable exceptions, and I would say the General Court has determined that facts have been presented in connection with those products which would indicate they should have exceptions.

Magruder, Ch.J.: The making and selling by bakers of bread?

Mr. Elcock: Yes, your Honor. And the selling of kosher meats on Sundays between the hours of 6 and 10 a.m.—that is specifically put in the statute.

Magruder, Ch.J.: Are these exceptions all exceptions made by the General Court of Massachusetts?

Mr. Elcock: Yes, your Honor. They are all made by the General Court. They are continued in Section 6 of Chapter 136. They are amended from time to time as the needs of the community would dictate.

Magruder, Ch.J.: Nor shall it prohibit the sale of fruits and vegetables by the person who raises the same. If the sale of fruits and vegetables is okay, why did they limit it to the person who raised the same?

[fol. 72] Mr. Elcock: Well, let's say, your Honor, you are calling attention to the fact that this is not a religious statute in that sense at all.

Magruder, Ch.J.: Well, they keep talking about the Lord's Day. That sounds, has a religious flavor.

Mr. Elcock: I think the history of the statute would clearly indicate that it had a religious origin. Certainly, when the Pilgrim ancestors enacted that statute they had

in mind then a community dictated by a religion, because there was a state religion, if you will, and to the extent that you would look at the history of the statute you can't ignore it, and if we push the history far enough back, your Honor, back into English common law, there was observance of the Sabbath, and back in the time of Christ there was observance of the Sabbath. Prior to the time of Christ, during Bible times, there was observance of the Sabbath; and in Genesis itself, your Honor, there is an indication that one day is set aside for rest. So that—

Magruder, Ch.J.: The statute merely says, "Whoever on the Lord's Day," etc. Who determines what is the Lord's Day?

Mr. Elcock: It has been determined by the Massachusetts cases, that the Lord's Day refers in Massachusetts to Sunday, the first day of the week. That was a determination made, your Honor, many years ago.

[fol. 73] I believe, your Honors, that when some of these statutes were enacted it was not necessary, perhaps, to spell out in detail what was meant by the Lord's Day, because everybody in the community at that time would have had no doubt whatsoever what was meant by it. It would be like saying, in Massachusetts the crime of murder is punished in such a way but the crime of murder is never defined. You may look to the common law to determine what is meant by murder. Likewise, your Honors, the Lord's Day was obviously Sunday as far as our common law tradition is concerned, and the use of the Lord's Day in our statutes would clearly imply the interpretation of that word that had been given to it by the courts, not only of America, but of England, from whence we derive our judicial system. To that extent, although the word Lord's Day is there, it is referring to one particular day of the week, and I cannot deny, and do not desire to deny, your Honors, that there might initially have been a religious basis for a statute of this sort. Obviously, prior to the Declaration of Independence and the setting up of a system as we know it here in America, there were religions. And people had been banished from the Commonwealth because of failure to observe those religions. Now that has all been changed, your Honors, by virtue of our Constitution where there

may be no statute that regulates religion, and to the extent that there were any such statutes, they have long since [fol. 74] been made to give way to a current understanding of the people who live in America and enjoy it. However, where a statute has been on the books for a good many years and happens to use the word Lord's Day, the mere fact that it refers to the Lord's Day I do not think would in and of itself make it invalid.

I would go one step further.

McCarthy, DJ.: Does the Lord's Day refer to the religion of the Orthodox Jews, as well?

Mr. Elcock: I suppose it could have been interpreted as meaning the seventh day of the week. If it did, then we would have another group that might want to celebrate Sunday and they would be in here contending that some other day should be taken.

McCarthy, DJ.: Aren't there a number of cases which say that the first day of the week was chosen because it represented the day of the week on which a great majority of the people that care to go to church did go to church?

Mr. Elcock: At that time, your Honor, it perhaps was deemed best in the interest of the community that the day set aside should be the day when people would not be working anyway. To the extent that one such day was set aside even at that time, however, I think there would have been some inconvenience to persons then who would not have celebrated, would not have carried on their religions on Sunday.

McCarthy, DJ.: Are there any days outside of the first [fol. 75] day of the week that are represented as the Lord's Day in any other States of the Union?

Mr. Elcock: I am unfamiliar with that, your Honor.

I will go back once again to the general allegation that this statute is an exercise of the police powers and has been determined by the United States Supreme Court to be a valid exercise. I would add a further complication. Any exercise of the police powers would obviously have to be a reasonable one. But, also, any exercise of the police powers may well be one which would cause some injury which would have to be recognized by a sovereign who is purporting to exercise such police powers. If no one were

injured thereby, everybody desired it, you probably wouldn't actually need any police power as such. The mere fact that you have a right to compel in one sense would indicate that there is a hardship or a difficulty which would be imposed on individuals. Now, whatever day might have been fixed by the Commonwealth of Massachusetts or any other state for the purposes of setting aside as a day of rest, would certainly cause inconvenience to some people. Some people might desire to observe no religious customs at all. They might desire to operate their business on certain days of the week and thereby derive a greater profit than otherwise. To the extent that persons having no religious persuasion are prohibited from opening their store on Sunday, they certainly suffer an inconvenience; and yet, an inconvenience which is suffered by [fol. 76] some members of the general public is recognized under the police power if the general good is promoted.

So we would say, your Honors, there is some inconvenience, possibly. The General Court has attempted to circumvent some of these inconveniences by spelling out these exceptions to the statute. Whether the exceptions are broad enough is something I think is for the General Court to decide rather than to say that the whole statute is unconstitutional.

In connection with the particular petitioners in this matter, I would call the attention of the Court to the fact that they may be open on the Lord's Day for the purpose of selling kosher meats between the hours of 6 and 10. Now they contend, I suppose, that it is inconvenient for them to have to shop during those limited hours; but no one else is allowed to open up for the sale of meat at that time. It is a special exception in favor of these people in order to enable them to carry out their religious ceremonies in a little more convenient manner.

Now opening on Sunday, as I understand it, wouldn't have anything to do with the conduct of their religion. It is that they are prohibited on Saturdays from making purchases, and therefore they would like an opportunity on Sunday at least to be able to acquire some additional meat or something of that sort, and to that extent the General Court has put in the exemption. And they have

gone further, as I pointed out before. As far as the exer-
[fol. 77] cise of police power, it is more than fair and equitable in these circumstances because of the clause of the statute prohibiting the performing of any secular work on the Lord's Day by any person who conscientiously believes the seventh day of the week ought to be established, and actually refrains and so forth from labor on that day if it disturbs no other person.

I would say, your Honors, that to the extent they opened up to sell a particular piece of kosher food to persons unable to buy it on Saturday and where the customers themselves have refrained from opening their places of business, it may well be there is an exception on behalf of the Crown Kosher Super Market. But to say they are allowed to open up a shop in toto and sell all kinds of goods and to sell them to the general public, is an interpretation of the statute which is a strange one. It is strange as indicated by our Supreme Court in that particular case of *Commonwealth* v. *Has*. You cannot just open up a store and throw all limitations out.

Now, your Honors, it may well be, in connection with this constitutional question, that as a result of a stipulation which Mr. Ehrmann may put in and as a result of evidence which may be introduced, that further matters which would not be open to me on a motion to dismiss should be heard. Subject to further argument on that line, I would close my argument on the motion to dismiss noting these points:

[fol. 78] (1) That although this Court has jurisdiction in equity, it should not exercise it if there is an adequate remedy in the State Court; and we say there is not only an adequate remedy here because some if not all of these parties could be prosecuted, and some have been in the sense of the manager of the store; and

(2) There is no immediate hardship. This prosecution took place in 1957. They have had an adequate time to do something about it, they have done nothing about it, and just because they come rushing in here now claiming immediate injury, I think is asking the Court to go a long way in exercising its jurisdiction in connection with a matter which should be determined, first, in the State Court and then, if there is any dispute, it should go in the ordi-

nary course to the United States Supreme Court under certiorari. And our second ground, your Honor, apart from the fact that the Court should not exercise jurisdiction, is that the statute on its face is an exercise of the police power, it is a reasonable exercise because it grants many exceptions and grants specific exceptions on behalf of the petitioners in this particular proceeding. And for these reasons, your Honor, we would urge the matter be dismissed.

Magruder, Ch.J.: Thank you, Mr. Elcock.
Mr. Ehrmann?

STATEMENT BY MR. EHRMANN

Mr. Ehrmann: May it please the Court, this is rather [fol. 79] a late hour in the history of our jurisprudence to question whether basic constitutional rights may not be tested in the District Court by a 3-Judge Court. I think perhaps the classic statement of the situation was in the celebrated Oregon school case—Sisters of the Holy Names of Jesus and Mary v. Pierce, Governor of Oregon. You may recall that Oregon passed a statute to compel all parents to send their children to public schools. It was aimed chiefly at parochial schools. The plaintiff brought suit in a 3-Judge Court, and all of these objections that you have just heard were raised. They were covered, perhaps for all time, in that case. But I will indicate that there have been recent cases involving the same principle. It is so well stated that I hope the Court will forgive me—

Magruder, Ch.J.: What are the constitutional provisions in the Federal Constitution that you invoke in this case?

Mr. Ehrmann: In this case?

Magruder, Ch.J.: Yes.

Mr. Ehrmann: In the instant case?

Magruder, Ch.J.: Yes.

Mr. Ehrmann: The First Amendment, the prohibition against—

Magruder, Ch.J.: The First Amendment—

Mr. Ehrmann: —against a law—

[fol. 80] Magruder, Ch.J.: The first amendment is not binding on the State of Massachusetts, is it?

Mr. Ehrmann: Yes. The rights and liberties under the First Amendment have now been ruled to be included under the Fourteenth Amendment; so that the Fourteenth Amendment now comprises, so far as its prohibition of State statutes is concerned, the constitutional rights under the First Amendment.

Magruder, Ch.J.: You mean, about the establishment of religion?

Mr. Ehrmann: Establishment of religion, freedom of religion, freedom of the press, all those rights.

Magruder, Ch.J.: Well, I don't know what freedom of the press has got to do with this case.

Mr. Ehrmann: Well, no, it hasn't.

Magruder, Ch.J.: What is there about establishment of religion in this statute?

Mr. Ehrmann: Well, if your Honor pleases, it is getting a little bit ahead of my presentation. Whether this is a law tending toward the establishment of religion depends upon the primary question as to whether or not this statute, Chapter 136, sets apart Sunday as a religious Sabbath. If it does that—and I believe that a careful consideration of the statute and its history indicates it does nothing else but that—then using the criminal machinery of the State to enforce the Sabbath of another faith is obviously a law looking toward the establishment of religion under the threat of a subvention of a thousand [fol. 81] dollars, because it is utilizing the prosecuting machinery of the State to enforce people to give up their liberties on the Sabbath of some other faith.

McCarthy, DJ.: Well, what freedom do they give up? They can go to the synagogue, can't they?

Mr. Ehrmann: They can go to the synagogue on Sunday. That is exactly—your Honor has asked the question which is basic to this whole problem.

McCarthy, DJ.: Many of the Jewish synagogues are open on Sunday, aren't they?

Mr. Ehrmann: They are open every day of the week, if your Honor please.

McCarthy, DJ.: I mean, open for services.

Mr. Ehrmann: Well, they have certain limited services every day of the week. While it does not appear in the

bill, the services are very extensive on Friday night and on Saturday.

McCarthy, DJ.: I mean, those of the Reform Synagogues. Don't misunderstand me. They have Sunday School classes on Sundays.

Mr. Ehrmann: Many of the Reform congregations—

McCarthy, DJ.: All of them do; isn't that right?

Mr. Ehrmann: Well, they have them on other days of the week also.

McCarthy, DJ.: That's right.

[fol. 82] Mr. Ehrmann: But as far as the Orthodox Jew which is here represented, they have religious classes every day in the week other than Saturday. So I thought your Honor's question really proves this whole thing when you asked why don't they go to the synogague on Sunday?

McCarthy, DJ.: Are you relying on the Oregon case as the one case which distinguishes, which is the guiding star for our decision, the decision of this court?

Mr. Ehrmann: Oh, no, your Honor, please. I cited a dozen or fifteen cases on our brief. I was merely starting to answer Mr. Elcock's preliminary argument, that this Court should not entertain the bill, that's all. I just got started on that. As to whether or not the Court should dispose of the question here or send it back to the State Court—

McCarthy, DJ.: Now, concerning religious liberty under the First Amendment to the Constitution, how does this section at all interfere with the exercise of religion by the Jewish people? It doesn't compel them to go to any religious observance or have any religious observance to attend, or any religious service, does it?

Mr. Ehrmann: That is quite right.

McCarthy, DJ.: It doesn't interfere with their religious observation of whatever religious holidays they may wish to follow, does it?

Mr. Ehrmann: That is correct. But it places a very, very heavy penalty upon them if they don't.

[fol. 83] McCarthy, DJ.: What kind of a penalty?

Mr. Ehrmann: Well, I started to explain it a little while ago as I see it, but I may be mistaken. We have here a community in Massachusetts of very pious religious people.

They observe Saturday strictly. It is rather ironical that they should be here put in the position of challenging what is called the Lord's Day. They are a very pious religious people. They don't do anything on Saturday—or Friday night. The ritual with respect to food is quite complex. It isn't that they just don't eat pork and have to have meat which is slaughtered in a certain way. It is very complex, and they try to live by it. The ordinary pressures for them to give up their faith or the expression of it, living in a society such as we have, are enormous. Along comes the Commonwealth of Massachusetts and then adds a criminal penalty if they do anything on Sunday; and I suggest to this Court as strongly as I can, that to pressure people to give up their faith by making their business suffer a great loss, as the Crown Kosher Super Market would if it had to close on Saturday and Sunday also, and render it inconvenient and difficult to observe their duties if they want to buy food on Sunday that is ritualistically proper—that there has been added a terrific pressure, backed by the criminal machinery of Massachusetts, to observe some other day than their Sabbath.

Now that has been covered in the Everson case, I think. [fol. 84] That is the case, your Honor will remember, in which the question was raised as to whether the State could pay fares on school buses to take children to private and parochial schools as well as the public schools, and the Supreme Court held it was proper as a matter of safety. But the Court then went on to make a classic distinction of what the establishment of religion meant, and that statement clearly comprises what we are faced with today. The statement is quoted on my brief. This is from the Everson case. For the record, this is Everson v. Board of Education, 330 U.S. 1. And this is the most quoted definition:

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . "

This is also dealing with a State statute:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one

religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious [fol. 85] activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against the establishment of a religion by law was intended to erect 'a wall of separation between Church and State'."

Later on, in the McCollum case that was designated as "a specious conception", with a "secular reach far more penetrating in the conduct of government than merely to forbid an established church."

McCarthy, DJ.: Isn't the gist of your complaint here that the religious liberties granted under the First Amendment of the Constitution should be extended so as to protect the business interests of those who are in a minority, that is, so far as observance of Sunday as the Lord's Day is concerned?

Mr. Ehrmann: We think it already exists. The First Amendment is quite adequate to cover that situation as it is now.

McCarthy, DJ.: You are familiar with the Jacobson case, aren't you, 197 U.S. 11? Let me ask you this?

Mr. Ehrmann: Yes.

[fol. 86] McCarthy, DJ.: Isn't it true that the religious convictions—

Mr. Ehrmann: That was the vaccination case.

McCarthy, DJ.: That is correct.

Mr. Ehrmann: Yes.

McCarthy, DJ.: Wait a minute. Isn't it true that the religious convictions involved in this case be subject to

some sensible limitation in the same manner as they were established in that case, that is, subject to limitation by reasonable exercise of the police powers? Because, if you don't do that, you will have no day set aside for a day of rest or a day when a person can have an opportunity to exercise his religion. Obviously he would have to work, and obviously Sunday was fixed because it represented, didn't it, the majority of people that might care to go to church, with no reflection upon the good Jewish people or the Seventh Day Adventists.

Mr. Ehrmann: Your Honor, it seems to me, has stated correctly the principles; but the problem we are confronted with now is, whether there is justification for the exercise or the intrusion of this police power into the affairs of the Crown Kosher Super Market, Inc.

McCarthy, D.J.: How are you going to have a test of the exercise of the police power unless you recognize the conditions that apply to it?

Mr. Ehrmann: That is exactly what we have attempted [fol. 87] to do on our brief. As my brother has correctly stated, the burden of this statute was in a puritanical day, and it was one of the early Blue Laws, and there was no question about it but that it was religious in its conception, and those religious preambles have been approved as recently as a few years ago by the Massachusetts Supreme Court.

There isn't one thing in that statute, if your Honor please, or one expression of the Legislature, that that is anything else than primarily a religious statute establishing a religious holiday. Even the exceptions hitch around it. For instance, the firemen may parade, but they have got to stop the music within 200 feet of a house of worship on Sunday. There may be other parades, but they must stop the music within 200 feet of a house of worship. Baseball games may be played on Sunday, but not within a thousand feet of a house of worship. On any other day they can, even in front of a synagogue on Saturday they can blare all the music they want to but not on Sunday.

Now every one of these exceptions that permit the sale of merchandise, practically every one, is hitched around with hours. A bootblack may do it before 11 o'clock. Base-

ball, football, hockey may be played in the afternoon, not the morning. Bread may be sold before 10 and after 4:30 in the afternoon. Even the exceptions indicate that the purpose of this Act, or these exceptions, was to protect the church worship of those people who went to church on Sunday.

[fol. 88] Now how did they get to be established in one day of rest on Sunday? I submit to this Court it never got there. It was made up by the Massachusetts Supreme Court in *Commonwealth* v. *Has*, that my brother has quoted. Without any statement as to evidence, without any analysis of the statute—so far as I know this statute has never been analyzed by the Supreme Court of Massachusetts. So long as the defendant who was prosecuted under this statute did not raise the question of his own religion, that he observed the Sabbath, they always said it was a religious day. That was the purpose of it. We know there is a saying that the Puritans came to this country to worship God in their own way and force everybody else to do the same; and this statute represented that original concept, and there has been nothing that has happened since to indicate that it is supposed to set up one day a week as a day of rest and that day Sunday. The fact is, the evidence indicates quite the contrary, because everyone—

Magruder, Ch.J.: If we knocked out this statute as you request, would the Legislature be within its rights to re-enact some such provision as you just said that doesn't talk about the Lord's Day but talks about one day of rest in seven?

Mr. Ehrmann: We already have a statute directed to employers to give their employees one day off in seven. It doesn't specify any day but they must give 24 hours, a day's rest in seven. That is Chapter 129, I think, of the General Laws.

[fol. 89] McCarthy, DJ.: Don't you think, in the light of the history of the statutes—I have done a little work on it—which I find applies to every State in the Union, I haven't seen a state that doesn't have it,—don't they have in mind freedom of religious worship in the sense that people shouldn't be, and I hope it will never be, they

never should be obliged, to go to church if they don't care to on Sunday; but doesn't it concern the moral training of youngsters who can have the consolation of their father's presence and the opportunity for the father to spend some time with his children because he is working the other days of the week? Saturday he has to do his shopping; Sunday he has a chance, if he cares to, to go to his church or his synagogue, or take his youngsters out, and he learns to know them, they learn to understand him, the mother and father, and these youngsters get together with them and they form a society which is the kind of society that will help preserve our imperishable values. Don't you think that the wise men that framed these laws had that in mind? Don't you think the men that gave us this country for ours—

Mr. Ehrmann: Well, maybe—

McCarthy, DJ.: —were wonderful men—that came over here from persecuted lands and obviously set up a government such as we have, set up a law a hundred years before the union of the nation, the union of the Thirteen States and of the United States. Don't you think they had that in mind, too?

[fol. 99] Mr. Ehrmann: I don't know—

McCarthy, DJ.: They couldn't satisfy everybody trying to fix a day; and so well was that fixed, Mr. Ehrmann, that you can't make a contract on Sunday. You know that as a lawyer.

Mr. Ehrmann: That's right.

Well, now, if your Honor please, you have asked me really two questions: one, whether I thought the Founding Fathers had that in mind.

McCarthy, DJ.: I didn't like what you said about the family or the founders or the public, and that's why I said it. I don't agree with you.

Mr. Ehrmann: The second question which your Honor asked me was, Don't I think it's a good thing for the families to be together one day a week? I don't believe that my opinion is of any weight, but we are now representing a group of people whose reputation, I think, for fine family life is understood by everybody.

McCarthy, DJ.: I said,—

Mr. Ehrmann: And Friday nights and Saturdays are the days on which their families get together.

McCarthy, DJ.: I said, don't you think that our Founding Fathers had that in mind when they established these statutes which you refer to as puritanical? Don't you think they had that in mind?

[fol. 91] Mr. Ehrmann: I do not know what they had in mind. I think the object that your Honor stated is salutary. I can say I do not think they had that in mind if I look at the words they used. Their preamble read something like this:

> "Whereas, it is the duty of all persons, upon the Lord's Day, carefully to apply themselves, publickly and privately, to religion and piety, the prophanation of the Lord's Day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons: therefore, . . ."

then it is enacted. And the decisions of Massachusetts are full of cases approving those preambles. Some of them even mention,—for instance, in the preamble referred to in *Commonwealth* v. *Dexter*, it says, that the day is set apart among other things "for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society." And it goes on:

> "Whereas, some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society: to the great disturbance of well-disposed persons, and [fol. 92] to the great damage of the community by producing dissipation of manners and immoralities of life: therefore, be it enacted . . ."

So, I would reply to your Honor that I do not know what was in the minds of those who wrote it, other than

what they said. I agree with your Honor that it is most salutary there should be a day on which families get together so that they may enjoy the exhilaration and benefits of family life. But the group that are here in court today are exemplary on that very thing, and they do, on Friday nights and Saturdays they do get together, but they are being coerced to drop that and to do it on another day, which is not their Sabbath.

I do not know whether I have answered to your Honor's satisfaction or not.

McCarthy, DJ.: Do you realize that the signers of the Declaration of Independence were Jews, Protestants and Catholics? Do you realize that?

Mr. Ehrmann: I do. I realize that every statute merely because of its age is not entitled for that reason alone to great respect. For instance, it took nearly a century to get rid of the disabilities of Catholics and Jews for citizenship in many of the original Thirteen States; and in Judge Woodbury's state it wasn't until 1878 that that disability was removed.

Woodbury, CJ.: For holding office.

Mr. Ehrmann: For holding office, that is right. That is [fol. 93] correct.

McCarthy, DJ.: Well, take for example, Mr. Ehrmann, talking about religion, this applies to the Seventh Day Adventists. Isn't it proper for the Judaeo-Christian religion to recognize and give full faith and value to the others? If you are going to believe in the Christian religion you've got to take as its foundations the revelations that were given by God to Jewish philosophers who were very holy men. Isn't that true?

Mr. Ehrmann: That is true. And I want to say to your Honor that just a year ago last summer I stood on the shores of Lake Galilee in front of the Mount where Jesus delivered the most eloquent sermon in history; and in that entire sermon he stated what is the basis of what your Honor has just called the Judaeo-Christian religion, and he said,—

McCarthy, DJ.: Within the shadow of that is the State of Israel. Isn't that so?

Mr. Ehrmann: Yes. And what he said was this:

"Do unto others that which you would have them do unto you. That is the law and the prophets."

And about 25 years before that the great Rabbi Hillel, one of the great Jewish rabbis, was asked by a scholar what was the Jewish religion, and he said, "Tell it to me while I stand on one foot." Rabbi Hillel said: "Do not do unto others that which you would not have them do unto you. That is the law. All the rest is commentary."

[fol. 94] So I feel that the First and the Fourteenth Amendments are there to translate into the basic law of our country the concept, that just because you have a majority you don't take advantage of or you don't push a minority; and the way we live together in a democracy is, we all have to respect one another.

Now I respect these Orthodox Jews and their dietary laws, strict observance of the Sabbath, the people who eat fish on Friday, and all the other faith indicia. And it is good for our country, it seems to me, that there should be this variety. It enriches our culture and it adds to alertness in the life of our nation. But when a group takes those particular things rather than the basic thing I just mentioned and tries to impose them on somebody else, that is when the trouble happens, and that is what our Supreme Court has been wrestling with for the past ten or fifteen years.

Those cases that are bracketed under *Brown* v. *Topeka*, the segregation cases, deal with the same issue which is before you today. The people in the South passed statutes treating the colored people differently from the white people; and I think that we should be very, very grateful, and thank God, that the Supreme Court is breathing the breath of life into those First and Fourteenth Amendments and making them live in a democracy. And therefore I feel that these particular things, the way that we express it—it isn't important in the life of our democracy whether Saturday is observed, or Sunday is observed, or [fol. 95] whether kosher is eaten, or whatever else is done; but the thing that is important in the life of our democracy is how we live together—we don't abuse each other, we re-

spect each other. And here we are, here are the great faiths of America, all unite on a platform that we don't behave like that; and we have the great constitutional amendments that tell us that we don't behave like that. We don't pass laws oppressing a minority merely because we have the votes.

There was a referendum in California just last week to revoke the tax exemption of private and parochial schools. Now, when I read this, I felt that was another example of a majority trying to take advantage of a minority. Fortunately, it was defeated. But there is a law on which all of us can agree, namely, those laws that are incorporated in the First Amendment and in the Fourteenth Amendment, which prevent people, simply because they are a majority, from putting their views over on a minority, their particular religious views or particular racial views, or their views as to nationality. Now, I think we got, or I got at least—I didn't intend to talk like this but your Honor inspired me to do it—I was discussing the cases that my brother had brought as a reason why this Court should not consider the bill that has been presented.

Woodbury, CJ.: We are back now on the Pierce case, I take it?

Mr. Ehrmann: Yes, back on the Pierce case.

[fol. 96] Woodbury, CJ.: Now there's one point in that Pierce case that I thought might distinguish it from this one. In that case, if the Oregon law was good, the value of property devoted to school purposes would be destroyed, or practically so, I take it?

Mr. Ehrmann: Yes.

Woodbury, CJ.: That is not true of this situation, the case at bar, is it?

Mr. Ehrmann: In this case there is an allegation of great damage.

Woodbury, CJ.: Yes; but it is not destruction, it is not serious damage, is it?

Mr. Ehrmann: Well, it is a loss of at least a third of the business of the entire week. How much of that could be made up is a question, perhaps, of evidence; but the allegation there would be this very great damage. You will see that this store would be open practically only five days a week. I don't think that 6 to 10 provision is at all prac-

ticable. You can't have employees come at 6 o'clock in the morning and pay them for an entire day just for working between 6, 8 and 10 and nobody shows up until 8 or 9, and the rabbi could not perform his functions without getting up before dawn. I think, with all the best intentions in the world, that our Legislature just simply didn't understand what they were doing.

Woodbury, CJ.: Well, it would rather stretch the practicability if a third of the week's business is done on Sun- [fol. 97] day. Do we have to take that allegation of the complaint as true for purposes of this hearing? I suppose we do.

Mr. Ehrmann: Your Honor, it is alleged in the bill, and I suppose on a motion to dismiss it is taken as true, but I have brought Mr. Chernock here who has his books of entry in which he shows that more than 33⅓ per cent of the business is done on Sunday; so that, while we have to take the allegation as true, we have the proof here if it becomes material.

McCarthy, DJ.: If he has those books, couldn't he have taken them to the General Court and shown them to the members of the House and Senate? And couldn't it have been cured that way by giving him until 3 o'clock in the afternoon? Couldn't that have been done?

Mr. Ehrmann: Well, this isn't in the bill of complaint but there have been efforts to change the law and have been unsuccessful, as Mr. Leen has pointed out in his brief.

McCarthy, DJ.: Did what's his name, Mr.—did the manager of this particular store, or did the stockholders of this particular corporation, come in here at any time to get legislation which would cure this defect through the General Court?

Mr. Ehrmann: Mr. Chernock did get such a letter and he was assured that there would be the bill—that a bill would be passed, and he was finally notified that it didn't [fol. 98] even come out of— No, I think after the second reading that was the end of it. It is not in the complaint, but I think it is a fair question. There has been this effort.

McCarthy, DJ.: What about the activities of the owners? You say he is the only one to come in?

Mr. Ehrmann: No, he is—it's not in the complaint but he is a quarter stockholder.

McCarthy, DJ.: That's right. The corporation has done nothing about it.

Mr. Ehrmann: Well, it wasn't—

McCarthy, DJ.: No, they didn't, did they? The fact is they didn't, by name, make any attempt to obtain relief from the Massachusetts Legislature, the General Court, as you say. Did they?

Mr. Ehrmann: I don't distinguish between them. He was acting for the corporation.

McCarthy, DJ.: No, did the Crown Kosher Super Market of Mass., Inc., at any time ask for relief of the General Court?

Mr. Ehrmann: Yes, the Springfield legislators filed a bill on behalf of Crown Super Market and others that were situated that way, which passed the House and was rejected by the Senate. However, that would have no bearing on constitutional rights.

McCarthy, DJ.: I think that's right.

Mr. Ehrmann: As your Honor knows, this past year [fol. 99] there was an effort to change the law in the State of New York. Unfortunately, it led to a donnybrook and religious passions were aroused. One group was pulling this way and another group was used for propaganda purposes by both sides. It would seem to me that is not the way to approach the subject.

McCarthy, DJ.: It was this same question, wasn't it?

Mr. Ehrmann: I beg your pardon?

McCarthy, DJ.: It was this same question that was raised in New York, substantially?

Mr. Ehrmann: Not quite.

McCarthy, DJ.: I mean substantially.

Mr. Ehrmann: It was a question of—

McCarthy, DJ.: No, wasn't it substantially the same question?

Mr. Ehrmann: The same type of law, yes.

McCarthy, DJ.: That's right.

Mr. Ehrmann: There are quite a few states in the Union that have that exception. Ohio, for instance.

McCarthy, DJ.: That's right.

Mr. Ehrmann: That type of case was quoted on Mr. Leen's brief. The state of Ohio has a statute which says that it shall not apply to people who observe the Sabbath as the seventh day of the week conscientiously. So that question doesn't arise in Ohio or some other state in the Union. I think Indiana is another one.

Now, where was I? Should I return to the—

[fol. 100] Magruder, Ch.J.: I wish you would.

Mr. Ehrmann: The question raised by Mr. Elcock—the reason I was going to quote this Oregon School case was because it was so beautifully stated. I am going to give you confirmatory decisions in a minute. That case, which is 296 Fed. 928, was affirmed, and the Court said there—

McCarthy, D.J.: What case are you reading from?

Mr. Ehrmann: I am reading from my brief.

McCarthy, D.J.: What page is it?

Mr. Ehrmann: Page 25.

McCarthy, D.J.: What?

Mr. Ehrmann: Page 5 [Reading:]

"The question as to equitable jurisdiction is a simple one and it may be affirmed, without controversy. The jurisdiction of equity to give relief against the violation or infringement of a constitutional right, privilege or immunity, threatened or active, to the detriment or injury of a complainant, is inherent, unless such party has a speedy and adequate remedy at law; and in the exercise of such jurisdiction, the Court may, in proper cases, restrain state officers clothed with authority for enforcing laws, from the threatened enforcement of a State law which contravenes the Federal Constitu-

[fol. 101] tion, wherever it is essential in order effectually to protect property rights and rights of persons against injuries otherwise irremediable.

The principle that the remedy at law, if relied upon to supplant the equitable jurisdiction, must not only be plain, speedy and adequate, but as adequate, complete, practical and efficient to meet the ends of justice as that in equity, is so well settled as to need no citation of authorities.

It cannot be questioned that a party affected by an unconstitutional act need not wait until some step is

taken, under the act, that would affect him injuriously. One does not have to await the confirmation of threatened injury to obtain injunctive relief."

And in the case of *Terrace* v. *Thompson, Atty-Genl*, 263 U. S. 197, the Court states it even more plainly:

"They (the plaintiffs) are not obliged to take the risks of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their right. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal constitution."

[fol. 102] Now the Chernock case which was cited by my brother, also is on our brief, is finished. Mr. Chernock has been convicted, he took his exceptions to the Massachusetts Supreme Court, and his conviction was affirmed. That case is over. It isn't a question of res judicata or anything else. That case is over. Mr. Chernock paid his fine. However, the fact that he has been convicted makes it all the more urgent for him to come in here.

You may recall the Alabama bus cases. That situation was involved in *Browder* v. *Gale*. There are so many similarities to our case that perhaps it ought to be cited more particularly. That is *Browder* v. *Gale*, 142 Fed. Supp. 707; affirmed 352 U. S. 903. That was a representative suit brought by four colored people to test the constitutionality of the Bus law and ordinances that enabled the races to be segregated in buses. These colored plaintiffs had been arrested and convicted, just as Mr. Chernock has, although he is not technically a party to this suit. That didn't deter the Court from going in, and the same argument was raised, and the Court said, on page 73:

"The defendants, relying on Alabama Public Service Commission v. Southern Railway Co. at 341 U. S. 341, insists that even if the Federal Court has jurisdiction, it should, in its discretion as a court of equity, and for reasons of comity, decline to exercise such jurisdiction until the State courts have ruled on the

[fol. 103] construction and validity of the statutes and ordinances. The short answer is that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal Courts have the responsibility as heavy as that which rests on the State Courts."

And a number of cases are cited there.

One of the cases cited is *Doud* v. *Hodge*, 350 U. S. 485, 487, which was also a 3-Judge Court, to enjoin the auditor of Illinois from enforcing a certain act on the ground it was alleged to violate the Fourteenth Amendment, and the District Court dismissed the complaint on the ground that it lacks jurisdiction in the absence of an authoritative determination by the Supreme Court of Illinois, and the United States Supreme Court held that it was error to dismiss the complaint for lack of jurisdiction—that the District Court should have held and decided the case.

The desegregation cases dealt with the same problem. There you also had statutes that could be tested in the State Court; and in all of the cases, three of them, they brought their suits before a 3-Judge Court. The fourth case I think came up on mandamus but the other three came before a 3-Judge Court on a petition for injunction and a declaration of rights such as we have here.

[fol. 104] Now I don't know where that case of Time Films which is cited by my brother is in the District Court of the United States. I looked in the index and could not find it. For some reason or other—Miss Tweedy helping me—we could not find it indexed anywhere. It is true it was later decided by the Massachusetts Supreme Court, which held that Section 4 of this same chapter. 136, unconstitutional; and there, there is some indication as to perhaps why the case did not fit here—although I am speaking of something of which I know naught. But then there was another case pending in the Massachusetts Courts, *Brattle Films* v. *Commission of Public Safety*, 333 Mass. 58; and the Time Films case is 333 Mass. 62. The other case involved precisely the same issue, and the Massachusetts Supreme Court said, nothing appears that the

proper officers of Massachusetts omitted the point decided in the other case. So possibly that is the reason. I do not know. I wasn't there. Mr. Elcock was there and I wasn't. But I could not find it indexed in this court.

Now, on the question of constitutionality, with the assistance of the Court we have already developed a number of questions. The plaintiffs here say that where liberty is interfered with, as it unquestionably is here—because unless there is something to justify the exercise of the police power it is unconstitutional to tell a store it can't open on Sunday or any other day and so prevent customers from [fol. 105] exercising their right to buy food. I do not think the Court would want me to argue that, although the Opinion of the Justices of Massachusetts, 300 Mass., I think it is 615, clearly states that.

So the question is, then, on what ground is this interference with the liberties of these people justified? If there is violation of First Amendment rights, as is claimed here, as well as Fourteenth Amendment rights, then the cases indicate that that police power cannot intrude itself in the First Amendment unless there is an emergency, or unless there is such a serious situation that it requires the intervention of the State. Those rights are different from the Fourteenth Amendment rights. The law is well stated in the Barnette case. Perhaps I would read that, because this is one of the very important things in this matter that confronts us. In the case of *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624—that, by the way, was a Flag Salute case—the Court said:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourth Amendment, because it also collides with the principles of the First, is much more definite than the test when [fol. 106] only the Fourteenth is involved."

Then the Court goes on at some length and says:

> "It is important to note that while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case."

The principle was reiterated in *Thomas* v. *Collins*, 323 U.S. 516. That was the case of the union organizer who was caught under a statute requiring him to get a permit before he could solicit membership. On page 530 the Court says of the First Amendment liberties:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

Now what are those dangers that Chapter 136 involves so far as these people are concerned? Parenthetically I would say to the Court, as we did on our supplementary brief, that it may not be necessary to attack the entire act provided its application against these particular plaintiffs to observe another day of the week may be held to be unconstitutional. What is that grave danger that threatens the community? These people already observe a day and [fol. 107] an evening as strictly sacred. So far as their working anybody else is concerned, there is already a statute regulating employment in Massachusetts. They can't work anybody without giving them at least 24 hours off. What kind of a day of rest is it that says you may only sell tobacco provided you sell tobacco the other six days, or that you can sell certain other articles provided you sell them on secular days? That is, that you work the other days and then you can work on Sunday, but if you don't you can't.

What is this day of rest? Take this 6 to 10 exemption which I am sure the General Court intended as a concession and tried to be fair—but it's just impossible. It can't work. Now what does it say about working? Here's a day of rest that says that a store can be opened at 6 o'clock in the

morning. I don't know how the judges of this court rest, but I want to rest at 6 o'clock in the morning, at 7 o'clock in the morning, and, if my conscience is clear, until 8 o'clock in the morning. But here is a store that is supposed to be open to customers at 6, at 7, at 8, and then has to close at 10. Now why does it have to close at 10? Why does the bootblack have to stop at 11? Why does the selling of bread have to end at 10? Why does a parade have to stop when it gets within 100 feet of a church—stop playing the music within a hundred feet of the church; or games can't be played near a church?

It is clear that the whole statute dealing with exceptions is directed toward preserving Sunday as a day of worship [fol. 108] for people a majority of whom belong to a different faith, and there isn't a word in the statute anywhere to indicate that it is supposed to be a day of rest. In fact, they are encouraged not to rest because we now have, by exceptions, baseball, hockey, and two years ago they added lawn bowling. Practically all the sports, professional and amateur, are now permitted.

The progress of these exceptions has been to make people work more on Sunday than they ever did before—not to establish a single day of rest. And it is stated that the earlier Massachusetts cases said it was to be a day free of labor and amusement. Now we have plenty of amusement on Sunday. But, if that is the purpose of the Act, how would keeping open a kosher shop to sell food to people interfere with those people who want to go to the baseball game or play tennis or golf, or picnic? I suggest on my brief that maybe they would like to get a sandwich to help their picnic. There is no interference at all.

Who are the people who are resting while this store is open whose rest would be disturbed? The employees have already had 24 and more than 24 hours' rest. Are the others resting after 10 o'clock but not before 10 o'clock?

I think, when you look over this Chapter 136, your Honors will see that there is an utterly impossible police job if that Act were enforced, just utterly impossible. With all the different times and conditions and limitations that [fol. 109] appear in it, there is no possible way in which that can be enforced.

The plaintiffs claim that their rights under the First Amendment both as to established church and their liberty are infringed. They all complain that their rights under the Fourteenth Amendment are infringed. The situation is somewhat different there. These considerations do not have to be as grave. The test there simply is, is the reason a reasonable one for the exercise of the police power? And, if it is reasonable, is the statute directed actually toward that end? And if the question is raised, as it is here, concerning equal protection of the law, does it make sense as a classification? Does it make sense when a drug-store can be open and a grocery store can't, or does it make sense they can sell tobacco but not a pastrami sand-which? Where is there rhyme or reason in connection with it?

I will say this, that if the purpose of the statute were held well enough, which it doesn't appear to be—although it may have some subordinate object of that type but doesn't appear in the statute itself or from anything we know of it—if it had that as an end, then we would have to consider whether or not the statute itself is directed reasonably toward that end.

I have here a compilation which I made of some of the commercial things which may be done on Sunday. This does not include the many amateur and voluntary things [fol. 110] which may be done, but only the things that are done for money; and the Court will see from this list that apparently what has happened is simply this. They start off with a Blue Sunday, with no exceptions. And then if different groups want to do different things they pressure the Legislature to get it done—not to make sure that there is a day of rest in seven but to make sure there isn't going to be a day of rest in seven. They want to do other things.

There are only three bases on which this statute can be held constitutional as I see it—or, let me say, on which it can be supported. The first is that it is religious in its significance and sets up Sunday as a religious holiday. If it does that and, I might add, if the effect is to do that as well as its object, it is clearly, under all the decisions that we have, unconstitutional. Even the State of New

York, which has held a law different from ours but the effect is the same, has said that if it created a religious holiday it could not be held constitutional. So they do the same thing that our court did in *Commonwealth* v. *Has* and said it isn't that at all—it is simply to create a day of rest. And Massachusetts has followed that up with decisions coming after *Commonwealth* v. *Has,* stating it was a religious holiday. We have some of them cited on our brief. But it is only when somebody brings up he observes another day that this has come in.

Now there are four cases that I know of in Massachusetts to my knowledge where the defendant has raised the fact [fol. 111] that he himself observes another day. There is a collection of cases. The first one is the foundation case of *Commonwealth* v. *Has,* which has been cited here, where the court simply out of hand said it is not a religious day at all, it's a day of rest. That case is the basis for the other three decisions.

Another case is *Commonwealth* v. *Kirshen,* in which a Jewish defendant was operating a shop and he tried to comply with *Commonwealth* v. *Has* and left the door open to his shop. He didn't open it wide, but just left it unlocked so that the workmen could come in and work. He observed the Sabbath, and so did his workmen; and the court came out with a curious decision there, if your Honors please, because it has a bearing on this. The Court there began to construe the words "keeps his shop open" and said, it is true the shop is closed to the whole world but it was open to the employees and therefore we ruled it was open. In other words, part of the statute no longer means disturbing anybody else, it is disturbing the workers who already have had 24 hours and who want to work—they are the ones that were disturbed. That is the case of *Commonwealth* v. *Kirshen.*

Another case is that involving Mr. Chernock, who is the manager of the store in the present case, where the Court simply relied on *Commonwealth* v. *Has.* It did not re-examine the statute at all. It has never been re-examined. [fol. 112] I think there was another case involving a kosher butcher shop; and that case, again, did not consider

the hardship on the defendant or examine the statute; it simply said he kept his shop open and that's that.

Just as a matter of record I think perhaps I should read these four cases in, because I think they are the only cases that deal with defendants who claim they observe the Sabbath.

Oh, there is *Commonwealth* v. *Hyneman.* That is an interesting case. That was the first case. That is *Commonwealth* v. *Hyneman,* H-y-n-e-m-a-n.

Woodbury, CJ.: Will these be in your brief, Mr. Ehrmann?

Mr. Ehrmann. Not all of them. *Commonwealth* v. *Hyneman* is not.

Magruder, Ch.J.: What citation?

Mr. Ehrmann: 101 Mass. 30. That is a very interesting case. In that case the defendant violated a statute by selling liquor on Sundays; and it is interesting to note that the Court held this had nothing to do with the Sunday statute, the Commonwealth was regulating the liquor traffic and maybe it might have been unconstitutional if it had been brought just under the Lord's Day statute because Hyneman said he closed on Saturday. That case expressed a little doubt.

The next case is *Commonwealth* v. *Has,* which we have discussed. This is the foundation case and the only Massa- [fol. 113] chusetts case that has characterized the Act, the first case that has characterized the Act as a rest case. That is 122 Mass. 40. Has is H-a-s.

Woodbury, CJ.: That is in your brief?

Mr. Ehrmann: That is in the brief, yes.

The next is *Commonwealth* v. *Starr.* I'm not sure I did cite that one. That is *Commonwealth* v. *Starr,* 144 Mass. 359. That was the kosher butcher. The conviction was sustained on the authority of *Commonwealth* v. *Has.*

Then there is *Commonwealth* v. *Kirshen,* 144 Mass. 151, which I mentioned a moment ago. That was the fellow that left the door of his shop open so the workmen could come in.

And the last one is *Commonwealth* v. *Chernock,* 1957 Advance Sheets 1057.

McCarthy, DJ.: May I interpose to ask you what was the page on Kirshen, 194 Mass.? Is it 151?

Mr. Ehrmann: Kirshen, 151.

McCarthy, DJ.: Thank you.

Mr. Ehrmann: However, except for the case of *Commonwealth* v. *Chernock* and there are Massachusetts cases galore, holding that, quite opposite to *Commonwealth* v. *Has*, it is a religious day:

Commonwealth v. *Dextra*, on page 7 of my brief, 143 Mass. 28.

Commonwealth v. *White*, on page 8 of my brief, 190 Mass. 578.

[fol. 114] *Commonwealth* v. *McCarthy*, 244 Mass. 484.

And there are other cases. That Somerville case, *Commonwealth* v. *Somerville*—I don't see the quotation of that here.

Woodbury, CJ.: You have *Davis* versus *Somerville*, for that on your brief.

McCarthy, DJ.: That is right. That case is in your brief.

Mr. Ehrmann: Yes.

Woodbury, CJ.: 128 Mass.

Mr. Ehrmann: Oh, yes, I have it in the index to the brief, if I can find it. 128 Mass. 594, cited on page 6 of the brief. And I believe there are additional cases quoted on the brief of the intervenor for the International Religious Liberties Association.

In all those cases where the defendant did not raise the issue that he was a Sabbath Day observer, a seventh day Sabbath observer, the Court made no bones about it. They said it is a religious holiday. And even today, the very cases that my brother refers to, the Time Films case and the other one—I think it's the first case—they were companion cases—in holding Section 4 unconstitutional (of 136), the Court said:

> "It is unthinkable that there is a power absent as to secular days to require sufficient advance scrutiny by governmental authority."

[fol. 115] The words "secular days" appear in the statute several times and in decisions dealing with the statute.

The word "secular" does not have any mythical meaning. It means non-religious, non-ecclesiastical. The statute itself uses the word "secular", and the decisions refer to the other days than Sunday under this statute as secular days. And the only case that gave it any consideration, and that was very brief and cursory, was *Commonwealth* v. *Has*.

I hope that this Court will really consider the statute itself, because if you let the light fall and look at it, it ceases to conform to the assumption that it sets up a day of rest. It doesn't do anything of the kind as a religious statute itself. It sets up a religious day subject to certain exceptions. Those exceptions all indicate that people could work seven days a week instead of six, and that is the import of the entire statute.

Now, I have been talking a long time, if your Honors please,—

Magruder, Ch.J.: It is nearly 1 o'clock. What do you want to do? Do you want to put in some evidence? Is there a stipulation? You said you had a stipulation.

Mr. Ehrmann: Yes. I should perhaps also say—I'm going to put the stipulation in now—that early in this case the plaintiff had a motion for a preliminary injunction, and your Honor suggested that instead of going on with [fol. 116] that motion the parties stipulate they would hold things in statu quo until this Court had had a chance to decide it. The solicitors in Springfield were kind enough to make such an oral stipulation, it wasn't written, and they have not violated it. They have not proceeded to have the statute enforced.

[Counsel sign stipulation and hand it to the Clerk.]

Magruder, Ch.J.: All right, Mr. Ehrmann. It is now 1 o'clock. How much more time do you think you will need, or is there any further witness that you want to call, or what?

Mr. Ehrmann: I would call Mr. Chernock for the purpose of explaining the difficulties of operating his store and many of the things that are already set out in the bill of complaint. I don't think it will take very long.

Magruder, Ch.J.: Mr. Elcock, do you want some more time after Mr. Ehrmann is through?

Mr. Elcock: I won't want time for witnesses, your Honor, as far as I know. I would like to examine some of his witnesses.

Magruder, Ch.J.: I am quite willing to sit if we won't be too long and get the case finished.

Mr. Ehrmann: How about now?

Magruder, Ch.J.: Now, or would you rather come back at 2:00 o'clock; which would be more sensible. Do you know how long you expect to take?

Mr. Ehrmann: Well, I don't think my direct examination of Mr. Chernock will take more than 15 minutes, but there [fol. 117] would be cross-examination.

Magruder, Ch.J.: We will take a recess and come back at 2:00 o'clock, Mr. Ehrmann.

[Recess from 1:00 p.m. to 2:00 p.m.]

[fol. 118] Afternoon Session

McCarthy, DJ.: Mr. Ehrmann, I would like to ask you a question because I may possibly be in error. When you say this matter was presented to the Court for relief, it wasn't presented as a specific matter concerning the plaintiff company that is here now; it was presented as an omnibus matter, wasn't it, covering everyone that was working in this field?

Mr. Ehrmann: As I understand the law—I had no direct contact with it—there was—

McCarthy, DJ.: I had, and I think you'll find I'm right.

Mr. Ehrmann: I think this was what they call the "fair Sabbath" law, that is, anybody who observes, closes on another day than Sunday—

McCarthy, DJ.: It is a general law that is covered already by a section of that code, that is, with reference to those at least have a similar position with reference to their devotion to the omnibus theory, they do not work on Saturdays and they are allowed if that is the case to work on Sundays. That was a clarification statute when it was presented and that is why it didn't come up or didn't pass. There was never anything filed by the kosher meat men.

Mr. Ehrmann: No, it was presented by three legislators from Springfield.

McCarthy, DJ.: Well, it didn't mention any—

[fol. 119] Mr. Ehrmann: There wasn't any particular store that would file a bill anyway, your Honor.

McCarthy, DJ.: It applied generally to everybody.

Mr. Ehrmann: Well, it applied—it is what they call, as I understand it, a "fair Sabbath" law. It applies to anybody who out of religious reasons observes another day.

McCarthy, DJ.: So they pass that and everybody said they observed it; it was one of those bills that was passed by the General Court predicated upon a hearing with particular reference to that which they sought, to get relief.

Mr. Ehrmann: Well, they had such laws in Ohio, Indiana, and many other states.

McCarthy, DJ.: I wanted to correct what you said to the Court.

Mr. Ehrmann: What was it I said that you say is—

McCarthy, DJ.: You said there was a bill presented and that it passed one branch of the House, one branch of the General Court, and never came out of the second.

Mr. Ehrmann: Yes.

McCarthy, DJ.: Well, it wasn't a bill with particular application to your clients. It was the bill that affected everybody.

Mr. Ehrmann: Why, certainly, it had to be. You couldn't get a bill—

McCarthy, DJ.: It was set forth in the bill.

[fol. 120] Mr. Ehrmann: Yes.

McCarthy, DJ.: It didn't concern the merits of your claim to remain open on Sunday.

Mr. Ehrmann: Any bill that applied just to—

McCarthy, DJ.: That wasn't presented particularly.

Mr. Ehrmann: Well, any bill that applied to what one store could accomplish would be clearly unconstitutional. It had to apply to a general class, or else it would be denying due process of law.

McCarthy, DJ.: No bill applying to a general class which can be stated in plain language to be kosher meat dealers. There is no record of any bill being presented to the General Court.

Mr. Ehrmann: No, I don't think there was.

McCarthy, DJ.: That's right.

Mr. Ehrmann: I don't know.

McCarthy, DJ.: That's why I want to correct the record on it.

Mr. Ehrmann: But that could be. It was not a bill applying to kosher meats, but it was a bill that applied to all religious groups who close up their stores on another day out of conscientious religious beliefs.

McCarthy, DJ.: It applied to anybody.

Mr. Ehrmann: I don't know that it applied to anybody except—

[fol. 121] McCarthy, DJ.: I don't want you to feel that I'm opposed to that, because I'm very strong for it.

Mr. Ehrmann: Well, I'm sorry if I misled anybody. I don't want to.

McCarthy, DJ.: Why don't you look it up? You'll find I'm right.

Mr. Ehrmann: Yes, you are right, I know you're right.

McCarthy, DJ.: I know I'm right.

Mr. Ehrmann: I think you're right. I never heard of a bill being introduced just with respect to kosher meats, but I did hear of what they call the "fair Sabbath" law respecting people who conscientiously observe another day who could be excused whether they sell or do not sell kosher meats.

Incidentally, that exemption that occurs in Section 6 has been ruled in *Commonwealth* v. *Has* not to include the opening of a shop. That exemption reads very broadly; in fact, in some states it has been construed to include the opening of a shop. It says, "nor shall it prohibit"—I'm now reading from the fifth paragraph of Section 6—

> "Nor shall it prohibit the performing of secular business and labor on the Lord's Day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually [fol. 122] refrains from secular business and labor on that day, if he disturbs no other person thereby."

Magruder, Ch.J.: What is the statute you are reading?

Mr. Ehrmann: I am reading from Chapter 136, Section

6, the first sentence of paragraph 5. Now that has been construed in *Commonwealth* v. *Has* as not permitting—

Magruder, Ch.J.: Well, now, Exhibit A doesn't have any such sentence in Paragraph 5, Section 5, rather, of the statute. Has something been added there? Exhibit A to your complaint has only a single sentence in Section 5, not this thing you have read.

Mr. Ehrmann: If your Honor will turn to Exhibit A, Section 6, the fifth paragraph that occurs on page 3, the first sentence reads as I have read. Now, as you read it you would think that certainly would permit the opening of a shop or store.

Magruder, Ch.J.: Well, you mean the selling or delivering of kosher meats?

Mr. Ehrmann: No, the next sentence, beginning with the next paragraph.

Magruder, Ch.J. [Reading]:

> "Nor shall it prohibit the performing of secular business and labor on the Lord's Day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and [fol. 122] actually refrains from secular business and labor on that day."

Now why doesn't that cover your clients?

Mr. Ehrmann: Because the Commonwealth of Massachusetts Supreme Judicial Court has so decided.

Magruder, Ch.J.: In what case?

Mr. Ehrmann: *Commonwealth* v. *Has* and many other cases.

Woodbury, C.J.: The Chernock case, I take it, would confirm that, wouldn't it?

Mr. Ehrmann: The Chernock case would confirm it.

Woodbury, C.J.: That is to say, the Court, the Massachusetts Supreme Judicial Court has said that keeping the petitioner open caused a disturbance to other people, or words to that effect.

Mr. Ehrmann: That is correct. It says in the case of *Commonwealth* v. *Has*, 122 Mass. 40, 41, they construe that very provision, and they say:

"The ruling of the presiding judge was, in effect, that the provisions of the 9th section could not be extended so as to permit the act of keeping open a shop upon the Lord's Day. This interpretation was correct. That the 9th section is not intended to permit, to the persons therein described, all the acts expressly forbidden in the previous sections, such as being present [fol. 124] at dances or public diversions or taking part in sports or plays, is quite clear."

Now, unfortunately, this Court also I should suppose is bound by stating the construction of its own statute, and if they say it means that, I would assume this Court would accept their construction.

Magruder, Ch.J.: Then what does this "secular business and labor" refer to here? It is keeping open and selling the products of the store, is it not?

Mr. Ehrmann: Well, I'm not sure I know what it means, if your Honor please, but I know what it doesn't mean according to that decision. It doesn't mean they can open a shop.

Magruder, Ch.J.: All right.

Mr. Ehrmann: As a matter of fact, there is considerable difficulty with respect to this entire statute, and this provision has been construed not to permit the opening of a shop. In some other states in almost exactly the same language it is construed the other way. Why they regard opening a shop as being business and labor I don't know but that is the decision of the Court. They say the history of the two sections is different and they stick to the history —they separate the two and they stick to that history.

Now I spoke before concerning the matter of a limited decree if this Court should hold Chapter 136 unconstitutional, particularly on the grounds of the First Amendment. [fol. 125] In that reply brief we filed we mentioned one case but there are also other cases, including the Massachusetts case cited by my brother, *Brattle Films* v. *Commonwealth*, 333 Mass. 58, and *Time Films* v. *Commonwealth*—

Woodbury, DJ.: Where is that, Mr. Ehrmann?

Mr. Ehrmann: They are not in my original brief. This point was raised by the brief of the intervenor; and in my reply brief I cited *Thomas* v. *Holland*, 323 U.S. 516, where the decree was limited to the facts of the particular case and relief afforded the class represented by the plaintiffs. The same is true of *Murdock* v. *Pennsylvania*, 319 U.S. 105. And in *Brattle Films* v. *Commonwealth*, 333 Mass. 58, and its companion case *Time Films Corporation* v. *Commonwealth*, 333 Mass. 62, the Court carefully said that it was limiting its declaration as to unconstitutionality only as it applied to those represented by the plaintiff under the facts stated.

McCarthy, DJ.: Could I have that case again, the one just before the last one?

Mr. Ehrmann: Brattle Films—

McCarthy, DJ.: No, I have that. The other one.

Mr. Ehrmann: *Time Films Corp.* v. *Commonwealth*, 333 Mass. 62.

McCarthy, DJ.: That is not the one I mean. This is *Murdock* v.—

Mr. Ehrmann: Oh, *Murdock* v. *Pennsylvania*.

[fol. 126] McCarthy, DJ.: Yes.

Mr. Ehrmann: 319 U.S. 105. That was practically the windup of a group of those Jehovah's Witnesses cases that were more or less gathered up in this Murdock case and finally decided by the United States Supreme Court. There are many other cases. I cite those as representative in which the Court has set forth the application as against these particular plaintiffs was unconstitutional. However, the law as a general law may be valid. For instance, the law requires people who sell magazines to take out a license—that is in the Murdock case—could be a valid law; but where that law is pushed so as to prevent a distributor of religious literature from getting back the cost of printing the item was held unconstitutional in that it infringed the right of free speech. Likewise in the Thomas case they held that the state had a perfect right to regulate a labor union, and even to require the obtaining, or at least the filing of a certificate before membership was solicited, and when that was used and pushed to the extent of deny-

ing labor organizers the right to speak because they were also soliciting membership, they held as to that type of plaintiff it was unconstitutional.

I have here a certificate which my brother has agreed may be introduced. I have only one copy. It is a certificate by the secretary of the Massachusetts Council of Rabbis, of which Mr. Sheinkopf is president, as he alleges in the [fol. 127] bill of complaint, and this certificate reads as follows:

> "I, Rabbi Moses D. Sheinkopf, Secretary of the Massachusetts Council of Rabbis, hereby certify that at a meeting of the Massachusetts Council of Rabbis held on October 30, 1958, the following resolution was passed:
>
> > VOTED, That the action of Rabbi Moses D. Sheinkopf, President of the Massachusetts Council of Rabbis, in joining as plaintiff in a case pending in the United States District Court for the District of Massachusetts of Crown Kosher Super Market of Massachusetts and others' v. Raymond P. Gallagher, Chief of Police of the City of Springfield, Massachusetts, being Civil Action No. 58-471-M, as representative of the members of this Council, be and is hereby ratified, approved and confirmed."

Mr. Elcock: If this is offered as evidence—my brother has stated I have assented to it. I have assented to the fact that there is a certificate here, but I don't think the substance of that certificate is pertinent to this particular hearing. I don't think a vote of that sort can join them as [fol. 128] parties to this proceeding, and I would object to the substance of it although not the form of it.

Mr. Ehrmann: There is no desire whatever to limit my brother's argument. I can't do that. He is entitled to argue that this is not a representative suit. But I would call to the attention of the Court that this is the way these cases are ordinarily presented. The desegregation cases are presented by a few plaintiffs on behalf of all others so situated. That is *Brown* v. *The Board of Education*, 347 U.S. 483, 495, in which the Court said that because

these are representative cases—then goes on from there. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *Browder* v. *Gale*, 142 Fed. Supp. 707; affirmed 352 U.S. 903—were all cases similar to this one in which those people brought suit in behalf of all others similarly situated because it is obviously impossible to make all others similarly situated plaintiffs in the suit.

Mr. Elcock: I withdraw my objection assuming it is also indicated that it is representative of the Massachusetts Council of Rabbis because they are parties in the suit.

Magruder, Ch.J.: As I understand it, this is an affidavit sanctioning the entry into the case as representative of the Rabbis on behalf of the other Rabbis.

Mr. Ehrmann: That is all it is.

Magruder, Ch.J.: All right.

McCarthy, DJ.: Are they all Orthodox Rabbis?

[fol. 129] Mr. Ehrmann: They are only Orthodox Rabbis. Orthodox Rabbis?

McCarthy, DJ.: Yes.

Mr. Ehrmann: Yes. This is merely to support the allegation that they are representative.

Magruder, Ch.J.: This is merely to support the allegation?

Mr. Ehrmann: That is right.

Now, Mr. Chernock.

HAROLD CHERNOCK, sworn.

Direct examination.

By Mr. Ehrmann:

Q. Where do you live, Mr. Chernock?
A. At Springfield, Massachusetts. 77 Prospect Street.
Q. Will you try to speak a little louder, please?
A. I will.
Q. What is your business?
A. I am at the Crown Kosher Super Market.
Q. Are you the manager?
A. I am the general manager of that store.
Q. Are you the Harold Chernock mentioned here this

morning as being the defendant in the complaint against you for keeping the store open on Sundays?

A. That is right.

Q. Is the Crown Kosher Super Market a corporation or a partnership?

A. It is a corporation.

[fol. 130] Q. How many stockholders are there?

A. Four all together.

Q. Are they four genuine stockholders or are they the wives of—

A. No, they are four genuine stockholders.

Q. What is your religion, Mr. Chernock?

A. I am Jewish.

Q. What branch of Judaism?

A. Orthodox.

Q. Whether or not you are an observer of the Sabbath?

A. I am.

Q. In your day to day life?

A. I am an observer of the Sabbath, that's right.

Q. Is your store closed from Friday sundown to Saturday sundown?

A. Till Sunday morning.

Q. How long have you been in the general business of a kosher market?

A. Oh, about 30 years now.

Q. How long have you operated a kosher market in Springfield?

A. In the Crown Kosher?

Q. Yes.

A. Since August 18, 1953.

Q. 1951?

A. 1953.

Q. Would you define for the Court what you mean by a super market?

[fol. 131] A. Well, we do sell everything. I mean, by everything, we sell meats, delicatessen, groceries, baked goods, ice cream.

Q. That is, you sell everything that is sold in a grocery and butcher shop?

A. We advertise a one-stock store. We sell everything in our stores.

Q. Are there any other such stores in the Springfield vicinity?

A. You mean where they sell in a kosher super market?

Q. Yes.

A. No, not in that vicinity.

Q. Where is the nearest such store?

A. The nearest one to my knowledge is in Hartford, Connecticut.

Q. Are there any items in your store that you sell that are not kosher?

A. There may be some groceries that are not strictly orthodox, such as crackers and some standard soups.

Q. Do you sell any meats that are not kosher?

A. No, I do not.

Q. And about what percentage of your groceries would you say is not kosher?

A. I would say 5 per cent, maybe.

Q. Now, are there other stores that sell kosher products in the Springfield area?

A. There is a few kosher butcher shops but not super markets.

Q. So that the only kosher stores of which you are aware [fol. 132] are the kosher butcher shops?

A. That is right.

Q. Are you thoroughly familiar with the kosher business in that area?

A. Yes, I am.

Q. Why do you close your store on Saturdays?

A. We are not allowed to be open on that day. That is our Sabbath, and it is not permitted to be open. We never have been. We wouldn't be allowed to.

Q. You do it out of religious conviction?

A. That is absolutely right.

Q. Now would you tell the Court the hours and the days on which your store is open?

A. All day Sunday from 8 to 6; also Mondays and Tuesdays; we open Wednesday and Thursday until 9; we open on Friday to sundown.

Q. So that for three days a week including Sunday you operate from 8 to 6?

A. That is right.

Q. And two days, from 8 a.m. to 9 p.m.?

A. That is right.

Q. And one day, Friday, from 8 a.m. until sundown?

A. That is correct.

Q. And sundown—by the way, let me ask you this preliminary question. You say on Friday you close at sundown?

[fol. 133] A. That is correct.

Q. And sundown, of course, varies from week to week?

A. That is correct.

Q. And from month to month?

A. That is correct.

Q. So that your hour of closing is a variable hour each week?

A. That is correct.

Q. Are you in position to give the Court an opinion as to the religion of most of your customers?

Mr. Elcock: I pray your Honor's judgment. I don't think he is in any position to give an opinion on that question.

Magruder, Ch.J.: Has he answered the question?

Mr. Elcock: I object to the question, your Honor.

Magruder, Ch.J.: What?

Mr. Elcock: I object to the question.

Magruder, Ch.J.: The question is what?

Mr. Elcock: To give an opinion individually, and there hasn't been any preliminary statement of facts to show that he is an expert in this subject.

Mr. Ehrmann: I'm not asking the question of him as an expert, but as a man who is running his business and thoroughly acquainted with his customers.

Magruder, Ch.J.: Let him answer the question.

Q. Can you answer the question?

A. I have a fairly good idea. I know most of my cus-

[fol. 134] tomers, and I have an idea what church they belong to, whether they belong to the orthodox, conservative or what they belong to. They belong to all churches, to the different congregation

Magruder, Ch.J.: I don't understand the purport of this inquiry, that is, if you are asking about other localities.

Is it your contention that he does more business with people of the orthodox faith? Does their number enter into it? Is that what you are contending? Why do you ask him what percentage of his customers are of the orthodox faith? Is that relevant to this inquiry?

Mr. Ehrmann: It may be, depending on how this matter lies in your Honor's mind. I can see the possibility of a decree that may hold the law unconstitutional as applied to Jewish people who observe the Sabbath in so far as they sell to those recognizing it for a religious purpose. I can conceive of a broader decree holding the law unconstitutional as applied to anyone who observes another day as the Sabbath. And then I can see the possibility of a third decree that the law is unconstitutional anyway.

Magruder, Ch.J.: All right.

Q. In addition to the hours of the day you have given, do you also close on Jewish holidays?

A. Yes, we do.

Q. How many of those are there in the year?

A. There are thirteen days in the year when we keep our store closed, besides on Saturdays.

[fol. 135] Woodbury, CJ.: That is, you mean throughout the week?

The Witness: Yes.

Woodbury, CJ.: Except Sundays.

The Witness: Yes, not Sundays.

Woodbury, CJ.: Do you then operate a larger percentage than other stores?

The Witness: No.

Q. You are acquainted with Rabbi Sheinkopf, are you not?

A. Yes, I am. He is present here.

Q. Yes. He is your rabbi?

A. That is correct.

Q. What part does he have in connection with obtaining kosher products?

A. He is the rabbi in charge of our markets.

Q. And does he make inspections himself?

A. He has an inspector who does it for him.

Q. In the bill of complaint which you signed and swore to, you stated that at least a third of your business was done on Sundays?

A. That is correct.

Q. Have you at my request brought in your original day book in which you have inscribed your different sales?

A. That is the one right here [indicating]. That is the book.

[Said book handed to Mr. Elcock.]

[fol. 136] Mr. Elcock: Your Honors, there has been as yet no evidence introduced this man is acting on behalf of the corporation, that the directors have asked him to act, or the officers have asked him to act, or anyone else; nor is there any evidence that this book has come from proper custody, and until that is properly established and it is clarified as to whether this man is acting as the representative or as a private individual, I don't believe that this should be made available.

Magruder, Ch.J.: He is coming here as a witness, he is called as a witness, and he says he is the manager of the store.

Mr. Elcock: That is right, your Honor.

Magruder, Ch.J.: And would not the manager of the store be better able to testify than anybody else?

Mr. Elcock: That I don't know, your Honor; and I think that should be made clear, as to what his relation is to the corporate plaintiff here.

Woodbury, CJ.: But he says he is the manager, the general manager.

Mr. Elcock: But the general manager generally doesn't have custody of books.

Q. Are you also president?

A. I am president of the corporation, and I'm a 50 per cent owner of the business.

McCarthy, DJ.: Do you keep these books yourself?

[fol. 137] The Witness: No, we have an accountant that comes once a week, every Monday, to the store.

Q. This was kept under your direction?

A. That is right. I see it.

Mr. Ehrmann: This is offered.

[Account book marked Plaintiffs' Exhibit 2.]

Mr. Elcock: Your Honor, may I have an exception to the introduction of that book, on the ground that it has not yet appeared that it is a book kept in the usual and ordinary course of business.

Magruder, Ch.J.: He has testified, he has identified, he has qualified the book. I understood from his testimony the book was introduced as part of his testimony.

McCarthy, DJ.: Your objection is, that only books that are kept in the ordinary and regular course of business of this corporation are admissible?

Mr. Elcock: That is right, your Honor.

McCarthy, DJ.: And I understood him to say that this was under the supervision of an accountant who came in once a week, and I would assume on that basis that it was a book kept in the ordinary course of business.

Mr. Elcock: Thank you, your Honor.

Q. Now would you turn to the week ending last Friday, the seventh day of November.

A. Just a moment. Yes, I have it.

[fol. 138] Q. Now would you read off the sales as indicated in that ledger book for each day of the week ending November 7th?

A. The week of November 2d, that was Sunday, we did $4,114.69; Monday, $742.54; Tuesday we did $1,037.83; Wednesday, we did $1,716.41; Thursday, we did $1,412.24; Friday, we did $470.78. We took in a total of $9,474.49.

Q. Now will you pick any week in the month of October?

A. Yes.

Q. What week have you?

A. The week of the 19th.

Q. Your weeks begin on Sunday?

A. That is right.

Q. Will you give the volume of recorded sales for each day of that week?

A. I've got to find it: Just a moment, please.

Q. Have you got them?

A. Yes, it's right here. We were closed two days; Mon-

day and Tuesday we were closed. It was a Jewish holiday. So Sundays—

Q. Let's take a week with no holidays. Unfortunately, in October and September there are Jewish holidays in them and that throws the figures out.

Magruder, Ch.J.: It is quite obvious they made some sales on Sunday, otherwise they wouldn't keep open, and I don't quite see why that is so important.

Mr. Ehrmann: These sales run from 35 to 40 per cent. [fol. 139] of the entire week, and Judge Woodbury properly asked a while ago whether he really did so much business on Sundays, and his ledger here shows that he did more business, a larger proportion of business than the complaint alleged.

Q. You better let me take this.

A. Here's the record here [pointing].

Q. You have here the week of August 31st, Sunday, $3,670.05; Monday, Labor Day, $2,173.52; Tuesday, $1,036.61; Wednesday, $1,741.82; Thursday, $1,537.34; Friday, $649.55.

Now take the week beginning August 1st: Sunday, $3,042.25; Monday, $847.49; Tuesday, $960.85; Wednesday, $1,607.89; Thursday, $1,277.24; Friday, $418.69.

July: —

Magruder, Ch.J.: I don't suppose you have any means of knowing whether if you were required to close on Sunday he would make up the business on other days of the week?

The Witness: We would lose very much financially. We could never be able to overcome that deficit.

Magruder, Ch.J.: Why not?

The Witness: On Monday we do very little business, to begin with, because our meats do not come in that day. On Friday we do very little business because we close up early in the afternoon. That would leave us actually only three days to do business, Tuesday, Wednesday and Thursday.

McCarthy, DJ.: But you have no competition within 25 miles, have you?

[fol. 140] The Witness: There are other kosher markets but not a super market in Springfield. There are other kosher markets and other kosher grocery stores but not a combination under one roof.

Q. Now what would you say generally about the proportion of your weekly business done on Sunday?

A. Closer to 40 per cent than 30 or 35.

Q. You say you do very little business on Friday. Will you explain to the Court why that is so?

A. Friday is not a good shopping day because our people prepare for the Sabbath and they don't wait until the last minute to do their cooking; and, besides, we close up early in the afternoon.

Q. That is, orthodox Jews do not cook on Saturday?

A. They do not. They're not allowed to.

Q. Do they cook on Friday eve, Friday night, than Saturday?

A. That has been the habit.

Q. Is that your explanation of why you have less business on Friday?

A. It's been like that since I have been in the business. We never did any business on Fridays.

Q. On some of these days you close at 6 o'clock, and on other days you keep open until 9. If you kept open until 9 on Mondays and Tuesdays, would that relieve the situation?

A. On Monday it would make no difference because we don't get our meats in until Tuesday.

[fol. 141] Q. That is, your kosher meats.

A. That is correct.

Q. What days do they slaughter in a kosher meat shop?

A. They slaughter all day, but we get our meat on other days. We get it in on Friday and also on Tuesday, twice a week.

Q. Do you get something on Thursday?

A. Very little. We get mostly on Friday to have it for the Sabbath.

Q. Now the statute permits a store to open at 6 a.m. on Sundays, between 6 a.m. and 10 a.m., for the sale of kosher meat. To what extent, if any, would that relieve the situation if you had to close otherwise on Sunday?

A. Whoever would come up at 6 o'clock in the morning to do shopping? They would have to get up in the winter time in the middle of the night to get there on time. And, besides, we don't have anything prepackaged. We have to cut our meats to order, and it will take us an hour to get prepared to do any business, and we can't get anybody to come in to do two hours work at that time. They wouldn't come.

Q. How many employees do you have?

A. At present we have six.

Q. Six employees. In your opinion, would they come in on Sunday mornings at those hours?

A. If they would come in for a couple of hours, to begin with I would have to pay them for the whole day; and, besides, I don't believe anybody would come at that hour [fol. 142] to do any shopping.

Q. Now, what is the rule about washing meat according to the Orthodox requirement?

A. In our religion, meats can only remain 72 hours after it is killed and then it has to be washed all over again.

Q. And are your meats sold on Sunday washed on Sunday?

A. Sunday morning at 6.

Q. Who supervises that?

A. We have an inspector who is appointed by Rabbi Sheinkopf, and he does it on Friday before we close up, or he can work Sundays.

Q. And he comes in again at 6 o'clock on Sunday morning?

A. To cut it up.

Q. Oh, he cuts it up at 6 o'clock?

A. At 8 o'clock.

Q. At 8 o'clock.

Q. Mr. Ehrmann: That is all. Has the Court some questions?

McCarthy, D.J.: Do you close at 10 o'clock Sunday?

The Witness: Do we?

McCarthy, D.J.: Yes.

The Witness: No, your Honor.

Q. Mr. Chernock, attached to the bill of complaint which you signed was a list of several hundred names with addresses. Do you recall that?

[fol. 143] A. I remember a petition being signed, yes.

Q. How were those names obtained?

A. They were signed right in our store.

Q. That is, they signed an original petition, did they?

A. Yes, they did.

Q. Have you made a search for the original of that petition?

A. Have I?

Q. Yes.

A. I looked for it and I don't have it.

Q. Did you search—who is Mr. Fein?

A. Mr. Fein is our lawyer in Springfield, and that's why I figured it was there. We went looking for it and we couldn't find it. We took and we gave him the original after it was signed.

Q. Well, is the list that is annexed to your complaint a true copy of the signatures that were obtained in your store?

A. Of the people that signed? Yes, they are.

Mr. Ehrmann: I would add here, we discovered after we got here this morning that the missing originals are in the office of Ribicoff & Kotkin, in Hartford, Conn.

That is all I have now.

Cross examination.

By Mr. Elcock:

Q. How many officers are there in the Crown Kosher Super Market?

A. Four.

[fol. 144] Q. Who are the other three?

A. Myself. I'm the president. Jack Sloat, Sam Schwolsky, and Sam Smith.

Q. Do you know anything about their religion?

A. Yes, I do.

Q. What is it, the religion of each?

A. They are all Jewish Orthodox.

Q. They are all Orthodox. How many directors are there in the corporation?

A. I believe there is; besides them, my wife, and our accountant, Henry Shapiro.

Q. Can you tell us the religion of the other two directors that you have now mentioned?

A. Harriet, my wife, is the same religion as I am. Henry is a cousin of mine and he is also the same religion.

Q. In this particular bill which has been signed by you it appears that the Crown Kosher Super Market of Massachusetts is named as one of the parties plaintiff. Do you, from your status as an officer and director, know whether the board of directors ever took any vote to institute a proceeding of this sort?

A. Do I know that?

Q. Yes.

A. That they ever—well, they went along, yes. They are all in favor, of course, to go along with this suit.

Q. Did they ever take a vote to that effect?

[fol. 145] A. That I couldn't tell you.

Q. Do you have the records of the corporation with you?

A. I have not.

Q. What are these here [pointing]? Is this part of the records?

A. It's our money we take in every day.

Q. Are they corporate records? Do you consider those records of your corporation?

A. They belong to the Crown Market, yes, sir.

Q. When you signed this petition alleging that the facts therein were true to the best of your knowledge and belief, were you doing that as an individual or as an officer of the corporation?

Mr. Ehrmann: I object.

Magruder, Ch.J.: Where is that?

Mr. Elcock: That is the affidavit following the attorney's signature.

Mr. Ehrmann: My objection is, if your Honors please, it is a legal conclusion. The Crown Kosher Super Market is the plaintiff, and I think the signature speaks for itself, so does the acknowledgment.

Magruder, Ch.J.: I don't find any such affidavit. I don't know where it is.

Woodbury, CJ.: The complaint is signed by counsel.

Mr. Elcock: The next page, your Honor. I think on the copy I have there is an affidavit attached.

[fol. 146] Mr. Ehrmann: There is a verification.

Magruder, Ch.J.: Not on mine.

Mr. Ehrmann: It is on the top.

Woodbury, Ch.J.: It goes over to Exhibit A on the copy I have.

Mr. Elcock: Well, perhaps what they filed is not the same as the one which was given to me.

Mr. Ehrmann: I think the original— Have you the original?

McCarthy, DJ.: Here they are right here.

Mr. Ehrmann: My brother is referring to the acknowledgment in which Mr. Chernock acknowledges that the complaint is true to the best of his knowledge and belief, and he says that he is president and general manager of the Crown Kosher Super Market. I don't know whether this is relevant, this cross-examination. I have not objected to it. But I think it is established that the president of a corporation has a right and authority to initiate a suit for the protection of the interests of the corporation.

Mr. Elcock: I have asked—.

Magruder, Ch.J.: Is it your suggestion at this point that the plaintiff, the Crown Kosher Super Market, Inc., is not a proper party to this suit?

Mr. Elcock: I can't find that it has ever joined in it, your Honor.

Magruder, Ch.J.: Well, what do you require to evi-

[fol. 147] dence their approval?

Mr. Elcock: Well, I would say a vote of the corporation.

Magruder, Ch.J.: Isn't there authority that can be shown? Do you have to have a vote of the directors in order to authorize commencing suit in the corporate name?

Mr. Elcock: Your Honor, I cannot conceive of a corporation taking any action whatsoever in the absence of a vote or bylaws authorizing the specific action that is taken. But, your Honors, I don't want to push that too much. I'm just suggesting it.

Magruder, Ch.J.: The motion to dismiss does not suggest any difficulty about the presence of the corporation as a party plaintiff, does it?

Mr. Elcock: Well, now, there is an attempt here, your Honor, to show that the corporate plaintiff is injured, and, if that is so, I think the corporation certainly would have a right to come in and show it was injured, but I don't think somebody else could come in and show it was injured.

Magruder, Ch.J.: I don't suppose the corporate plaintiff could come in and show it was injured except by somebody authorized to make the statement.

Mr. Elcock: Certainly, your Honor; all they would need do is name the officer. Now I would call the Court's attention to the fact that when this gentleman signed he did [fol. 148] not sign as president, he didn't sign as treasurer or as director: he signed "Harold Chernock".

Mr. Ehrmann: He didn't sign it at all. He made an affidavit that the facts were true.

Woodbury, CJ.: It is signed by the plaintiff's attorney.

Mr. Elcock: I'm talking about the affidavit, your Honor.

Magruder, Ch.J.: Let me see it.

Woodbury, CJ.: What is that affidavit? I haven't got it.

Magruder, Ch.J.: [Reading]:

> "I, Harold Chernock, do depose and say that I am president and general manager of Crown Kosher Super Market of Massachusetts, Inc., and the allegations are true.
>
> (Signed) Harold Chernock."

Mr. Elcock: We have a contention, your Honors, on the motion to dismiss, that this proceeding has already been presented in court through Mr. Chernock, in the State Court, and that he was a party then interested; and I would like to say here that Mr. Chernock is likewise a party interested right here now, and that to some extent that other proceeding would be res judicata, and to that extent I think it is quite material. However, I believe the point has been raised, and I will proceed elsewise.

[fol. 149] Mr. Ehrmann: The other proceeding is adjudicated, Mr. Elcock. It is all over. He was convicted and fined, and that's that.

Mr. Elcock: But even if it is all over, your Honors, and he had an opportunity to raise that contention in another matter, he obviously can't come in here again later, and raise the same problem involving the same violation where there has already been an adjudication. He had an opportunity to appeal to the Supreme Court.

Mr. Ehrmann: He is not complaining about that conviction. He is in here because he is going to be followed up by repeated prosecutions. That's why he is here—to have this court determine whether that is a constitutional proceeding. That is all.

McCarthy, DJ.: Couldn't he have had it determined in the State Court?

Mr. Ehrmann: I suppose if it had been raised he could have had it. Yes, he could have.

McCarthy, DJ.: He appeared through counsel.

Mr. Ehrmann: I beg your pardon?

McCarthy, DJ.: He appeared through counsel?

Mr. Ehrmann: He did.

McCarthy, DJ.: And it wasn't raised?

Mr. Ehrmann: It was not raised.

McCarthy, DJ.: All right.

[fol. 150] Mr. Ehrmann: Any more than the colored people in Alabama when they were under attack.

Magruder, Ch.J.: Is he a party to this suit? That is what I want to know.

Mr. Ehrmann: No, he is not.

McCarthy, DJ.: Why, I see his affidavit under oath. He says the suit was brought on behalf of the corporation.

Mr. Ehrmann: That is right. However, I would suggest even this—perhaps to clarify my own thinking. Although this is a suit by the corporation and one of the other partners is here, if it was Mr. Chernock himself, being the same man who had been convicted in the State Court and he brought this bill, he would be entitled to maintain it. Now what he is asking is, that this prosecution under an unconstitutional statute be stopped. It makes no difference that he was convicted before. That is one of the reasons he is here.

McCarthy, DJ.: Assume, for example, a corporation was named under that mala prohibita statute and criminal

proceedings were had in the Springfield Court, and assume that this gentleman was prosecuted: is it your contention that he would be out of court in this proceeding?

Mr. Ehrmann: No, indeed. He would be entitled to bring these proceedings just the same.

McCarthy, DJ.: As a plaintiff?

Mr. Ehrmann: Yes. It is to restrain further prosecution [fol. 151] that he brings this bill; and that is the case in a number of these leading cases. That is why they go to the United States Court. They don't want to be continually humiliated.

McCarthy, DJ.: What was the proceeding in the State Court?

Mr. Ehrmann: Mr. Elcock can answer that.

Mr. Elcock: It is in the stipulation, your Honor, which was filed by Mr. Ehrmann a few moments ago.

McCarthy, DJ.: No, no, I mean in connection with the disposition of that case, that civil proceeding?

Mr. Elcock: It is in the stipulation. You will find it in there.

Mr. Ehrmann: That civil litigation in the State Court is covered in the stipulation. It was an attempt to have a State injunction until the prosecution of Mr. Chernock would be completed, and that was completed and the bill was dismissed, and that case is also out.

Q. In answer to questions put by Mr. Ehrmann, you stated that you were the only kosher super market in the area and the nearest kosher super market to you was in Hartford, Connecticut; is that right?

A. Right.

Q. Are there any markets other than kosher super markets that might sell kosher foods in that general area?

[fol. 152] A. No, there isn't any other kosher super market, but there are a lot that sell kosher meats and kosher poultry in that area.

Q. Is there any other kosher super market in the area at all?

A. Meat markets, there are.

Q. There are?

A. Yes.

Q. Are they open on Sunday?
A. Yes, they are.

Magruder, Ch.J.: All day Sunday?
The Witness: Yes.
Magruder, Ch.J.: You say they are open on Sunday?
The Witness: They are. They are all open.
McCarthy, DJ.: You mean, these other kosher markets are open all day Sunday?
The Witness: Yes, they are. The markets in delicatessen stores, they are open on Sunday.
McCarthy, DJ.: In competition with the Crown Kosher Market?
The Witness: They are.
Magruder, DJ.: There is an exception in the statute, that says, they shall not prohibit "the selling or delivering of kosher meat by any person, who, according to his religious belief, observes Saturday as the Lord's Day". That is not limited, there is no limit on time there; that is limited [fol. 153] to the sale of kosher meat alone.
Mr. Ehrmann: That exception does not admit the opening of the store, and how they can sell it without opening the store, your Honor, I don't know. It doesn't permit the opening of a store.
Mr. Elcock: Well, now, that is what Mr. Ehrmann says. May I point out in my motion to dismiss, your Honors, this contention is discussed. That is a question of law this Court will be called upon to decide.
Magruder, Ch.J.: If it is not correct, then what is the difficulty about staying open all day Sunday?
Mr. Elcock: No difficulty, your Honor, whatsoever.
Magruder, Ch.J.: Then what is the shouting about?
Mr. Elcock: The difficulty is, that he is not restraining his activities in business between himself and the person who is in the same religious persuasion as well.
Magruder, Ch.J.: I don't see anything there. "The selling or delivering of kosher meats"—that is the exception.
Mr. Elcock: Look at the next sentence, your Honor. That is the one to which I direct attention.
Magruder, Ch.J.: "Or the keeping open of his shop on the Lord's Day for the sale of kosher meats".

Mr. Elcock: The next sentence.

Magruder, Ch.J.: "Between the hours of 6 o'clock and [fol. 154] 10 o'clock in the forenoon. Nor shall it prohibit the performing of secular business."

Mr. Elcock: Perhaps I can clarify it by calling attention to the statute and this Chernock case in the Mass. Court. The next sentence says:

> "Nor shall it prohibit the performing of secular business and labor on the Lord's Day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby."

Magruder, Ch.J.: Yes.

Mr. Elcock: Now, as we contend, this particular shop does not limit itself to sales to persons who are similarly situated in respect to the seventh day. They are open to the general public.

Magruder, Ch.J.: That does not prohibit the performing of secular business by any person who is an Orthodox Jew.

Mr. Elcock: But the difficulty is this, your Honor. Chapter 136 would prohibit someone else from coming into a store and buying, so these people would be engaging in an illegal activity by carrying on business with one who had no such exemption.

Magruder, Ch.J.: I don't see how you can read that into the statute. Where is Chapter 136?

[fol. 155] Mr. Elcock: Well, your Honor, the Has case, the gift case, says you would violate the law if you opened a gift shop generally to anyone; and that is what Mr. Ehrmann has pointed out. If this particular shop is open only for purposes of a man carrying on his business who is a member of the Orthodox faith, then there is no problem; but if that gentleman purports to deal with others who are not in that similar position who can make contracts of sale, then the other persons are violating the law, and this exception allows him to open a shop provided he doesn't disturb others, and to the extent that he is soliciting the commission of a crime by some sales to a person not

within the exemption of the statute, the Has case says of course you can open your shop generally; but where these people claim they can open it for the general purpose of taking care of their religious customers, to that extent I don't see anything here, nor do I see any advance cases I have found or Mr. Ehrmann has found, that prohibits that. People purport to say this sentence of the statute means nothing. Let me call the Court's attention to the Chernock case under which he was prosecuted just a short time ago in Massachusetts.

McCarthy, DJ.: Isn't your position, if he could open that store for the sale of kosher meat to people of the Orthodox faith, he could sell all the Jews? Is that right?

Mr. Elcock: I would say that could be so, your Honor.

Woodbury, DJ.: But he couldn't sell to Gentiles?

[fol. 156] Mr. Elcock: No, no, your Honor.

Woodbury, DJ.: The reason for that they say is, it is not a disturbance to others to sell those of his own faith, but it would be to sell to people of other faiths.

Mr. Elcock: Yes, your Honor. Now I may be wrong on it because there is no Massachusetts case.

Woodbury, DJ.: I think that is a strange interpretation of the statute.

Mr. Elcock: Because otherwise the wording of the statute would mean nothing. And I would call the Court's attention again to the Chernock case involving the prosecution of this gentleman, and when the exceptions came up the Court said this specifically in this case:

> "It is apparent that the facts show violations of Section 5 and do not bring the defendant within the limitations provided by Section 6, as amended, namely, that Section 5 shall not prohibit 'the selling (or delivering) of kosher meats by any person who, according to his religious belief, observes Saturday as the Lord's Day by closing his place of business during the day until 6 o'clock in the afternoon or the keeping open of the shop on the Lord's Day for the sale of kosher meat . . ."

Woodbury, CJ.: That is talking about the storekeeper [fol. 157] there; it is not talking about the purchaser.

Mr. Elcock: That is right. The storekeeper is prosecuted. He could not fall within the exceptions. They did not say the exceptions did not exist. They admit the exceptions are there. They said the trouble here was this gentleman tried to sell to everybody, and the statute says he cannot disturb anybody else in their business because of his sales. They specifically allow him to carry on activities of that nature; and to go beyond and say they may engage in all business would be an undue hardship on all people. This gentleman is saying how much business he does on Sunday. There is no difficulty doing business on Sunday if no one else can open up.

Mr. Ehrmann: Are you through?

Mr. Elcock: No.

Q. Now, then, Mr. Chernock, in your super market, you say you are the only one of the kind. The type you have described is one where you sell only kosher foods; is that right?

A. Yes.

Q. Everything you sell is kosher?

A. With the exception of a few items, groceries that are not strictly kosher. Our meats, our delicatessen, are strictly kosher under rabbinical supervision. We could not carry any other kinds.

Q. You carry all kosher foods but in addition to kosher foods you carry other foods?

A. Very few items in the grocery that are not; crackers [fol. 158] and things like that are not.

Q. Now I have heard no definition here of what you consider to be kosher foods. To some extent you have discussed kosher foods which may have been blessed by the Rabbi and are under the supervision of the Rabbi. Is that correct?

A. That is correct.

Q. What are these other kosher foods to which you have reference?

A. Well, Manishewitz products are strictly kosher items. There is crackers of different kinds that are strictly under rabbinical supervision.

Q. Can you name some more items?

A. There is—the names of the—there's quite a few items.

Q. Are any of them put out under a trade-name other than a kosher trade-name?

A. There is a "U" on some of them and a star on others under the kind they put out as kosher. I don't believe they put out any other kind.

Q. Are there any products in your store which you would classify as kosher products which might be sold in another store that did not purport to sell kosher meats and kosher foods?

A. I wouldn't really say that. I don't know.

Q. You don't know?

A. It could be.

[fol. 159] Q. Well, do you know what kosher foods are?

A. Of course I do.

Q. Do you know of any kosher foods then that you could buy in the A&P?

A. Do I know of any?

Q. Yes.

A. There might be some, but I don't know. I seldom go in there and I seldom shop there or look at their prices. I really don't know.

Q. Ever since you have been in business?

A. Honestly, I don't know.

Q. Have you ever been in any other super market that is a kosher market?

A. At times I have been, but I never happened to look.

Q. Name one of them.

A. That I have been in?

Q. Yes.

A. We have the Springfield Market.

Q. Is that a super market?

A. No, it isn't.

Q. How often were you in there?

A. Once or twice, a couple of years ago.

Q. You haven't been in another super market for a couple of years?

A. Not to my knowledge.

[fol. 160] Q. Do you have anything to do with the serving of foods in your store?

A. I just buy the meats. We have a man that buys groceries.

Q. Do you know anything about the purchase of groceries?

A. Not too much.

Q. You are the general manager of the store?

A. That is right; but he is just in charge, he buys the groceries.

Q. So you have nothing to do with the grocery part of the store?

A. Not to do the buying, no.

Q. Do you have any supervision of the sales in connection with groceries?

A. Not over the bills, no, sir.

Q. How did you get these figures then in connection with the groceries?

A. We have the registers rung every day. After the day is over, every item is rung separate: Meats separate, groceries separate, bakeries separate, fruit and vegetables separate. They are all in different divisions.

Q. Do you have anything to do with the figures relating to groceries?

A. Yes, I have to have the figures because—

Q. Do you know who the suppliers of your groceries are?

A. We buy them direct from Boston. It is called the Market Basket Stores.

[fol. 161] Q. Do you buy any products from the National Biscuit Company?

A. We do, yes.

Q. Are any of them kosher products?

A. Some of them are, some are not.

Q. Are they labeled kosher?

A. They are labeled with a "U" on some of them.

Q. Is it possible that you could have some products of the National Biscuit Company on your shelves that you would consider kosher and yet there would be no designation on them?

A. That is possible.

Q. Now, is that what happens in your store in connection with some products?

A. What do you mean does it happen?

Q. Are there products of the National Biscuit Company which are kosher?

A. I don't know exactly which ones, whether there is a "U" there or not. I couldn't tell you exactly which ones they are.

Q. Is it fair to say that many products which you would classify as kosher are products that are being purchased in other stores that are not kosher stores?

A. That is possible.

Q. Is it probable?

A. Possible.

Q. Is it probable?

A. I don't know. It could be, yes, I imagine.

[fol. 162] Q. How long have you been in the grocery business?

A. The grocery business I haven't been long. I've been in the butcher business all my life.

Q. How long ago?

A. In the grocery business I only came up since I opened the super market.

Q. Did you read over this complaint before you signed it?

A. Yes, I did.

Q. Do you recall anything in this complaint about the duties of a rabbi?

A. Rabbi? Yes.

Q. And do you recall anything in here about the fact that the rabbis cannot fulfill their religious duties to their congregations making food prepared in accordance with their religion at times when they are able to purchase them?

A. There were times like that.

Q. Well, when you signed this affidavit, did you read over the material? Are you familiar with this allegation about—

Magruder, Ch.J.: What is the page?

Mr. Elcock: I am calling attention to paragraph (c) on pages 6 and 7 of the petition:

> "Plaintiff Rabbi Moses D. Sheinkopf and the other rabbis cannot fulfill their religious duties to their congregations in making foods prepared in accordance

with their religion at times when they are able to pur-
[fol. 163] chase them if available."

Q. Do you recall signing that?

A. Yes, I do.

Q. What duties of the Rabbi would be not carried out if you could open on Sundays?

A. What duty would be what?

Q. What duty does the Rabbi do on Sunday that he could not perform if you were limited to, say, the hours of 6 to 10 on Sunday morning?

A. What could he do?

Q. Well, you said in here if you are limited to Sunday opening—

A. I didn't talk about the Rabbi. I was talking about being able to open.

Q. You were talking about the Rabbi. Let me ask you this. What does the Rabbi do on Sunday in your store?

A. What does he do in that store on Sunday?

Q. Yes.

A. When he comes in?

Q. Yes.

A. He washes my meats for me.

Q. Does he do that on Sunday?

A. He doesn't have to do it on Sunday. Now he does it on Friday.

Q. On Friday.

A. That's right.

[fol. 164] Q. He doesn't do it on Sunday at all?

A. He doesn't have to.

Q. Why not?

A. Because we are allowed three days, from Friday to Monday. We are allowed 72 hours.

Q. So, when Mr. Ehrmann talked about coming in before 6 o'clock on Sunday morning to wash the meat, that doesn't happen, does it?

A. He would have to close up. He would have to.

Q. He actually doesn't have to wash the meat on Sunday at all; is that right?

A. He has to do it before 72 hours. Let me explain to you. When the meat comes in Friday, we have three days

to do business with it. If they close me up, he would have to come in and do it.

Q. Well, if it is washed on Friday night you could sell it on Sunday, couldn't you?

A. Yes.

Q. And they do wash it on Friday night?

A. They do if it has to be.

Q. You get the meat in on Friday?

A. We get it on Friday. If it is killed Thursday, it has to be done Sunday morning because that is when we open.

Q. So, so far as the Rabbi is concerned, in your store the Rabbi does not perform any religious function on Sunday? [fol. 165] A. Yes, he does.

Q. What does he do?

A. He has to wash the meat when we have to have it.

McCarthy, DJ.: Just a couple of minutes ago didn't you say he didn't come in Sundays?

The Witness: No, I said, when the meat is killed Thursday we do it on Friday, because we are allowed 72 hours; but if we are not going to be able to sell it and meat will be left over, we will have to dispose of it and he will have to come in and do it. They are only allowed 72 hours.

Q. If you could open up on Sunday mornings between the hours of 6 and 10—there's no question on that. You can open up in those hours.

A. There's no what?

Q. You can open up between 6 and 10 Sunday mornings anyway, can't you?

A. To sell what?

Q. To sell kosher meat.

A. Well, that's what the statute says I can.

Q. You don't have to have a rabbi come in and wash meat on that day, do you?

A. Yes, he would have to come in.

Q. Didn't you just say he could do it on Friday?

A. Yes, he could do it on Friday. That's right.

[fol. 166] Q. How many super markets in the Springfield area are open on Sunday?

A. Super markets?

Q. Yes.

A. None, to my knowledge.

Q. None?

A. To my knowledge.

Q. How about yours?

A. I am.

Q. You are the only one open?

A. That's right.

Q. Might that explain why you do so much business on Sunday?

A. Why do I?

Q. You claim the only business you get that is substantial is that which comes in on Sunday, do you not?

A. Because we are closed Friday, we don't do business on Saturday, and we never did any business on Monday.

Q. Now how much of the business that you do on Sunday is done as the result of purchases by persons who are not Orthodox Jews?

A. I don't believe there is—very, very little.

Q. Do you know your customers?

A. I know most of them, yes, I do.

Q. They are the customers that are listed on this petition here?

A. Do you want me to look at the names?

[fol. 167] Q. Pardon me?

A. Do you want me to look at them?

Q. No, no, do you know them?

A. Those that signed the petition in my store, I know most of them.

Q. You know most of them?

A. Most of them.

Q. Do you have here any list of your customers?

A. Have I? I haven't got one, no.

Q. Do you know a Harold Machlin of 63 West Street, Springfield, Mass.?

A. Machlin? Howard Machlin, I know him, yes.

Q. Do you know him personally?

A. Howard Machlin I know.

Q. When was the last time he was in your store on Sunday?

A. When was Howard Machlin in my store? I couldn't tell you exactly which Sunday.

Q. Do you know any persons other than those listed here who might be your customers who were not Orthodox Jews?

A. Yes, there could be some.

Q. There could be some?

A. Yes.

Q. Do you see any in the court room?

A. Yes.

Q. Who are they?

[fol. 168] A. Not a customer, but he comes in. Mr. Ryan.

Q. Do you make sales to persons, to anybody who is in this room?

A. We don't discriminate. It would be bad business not to.

Q. Now you testified that on Sunday you have difficulty because of lack of employees in the store. How many do you have on Sunday?

A. How many what?

Q. How many employees did you say you had?

A. Six.

Q. Six. Does that include the people running the grocery department?

A. No, they are separate.

Q. They are separate. How many other separate ones that you did not mention do you have in there?

A. How many all around, you mean?

Q. Yes.

A. Oh, there are—you were talking about butchers then?

Q. No, I'm talking all told.

A. All around we have six, seven, nine, eleven, twelve.

Q. Twelve. You said six employees in the store?

A. I thought you asked me the meat department. You asked me how many butchers, and I said six. You didn't ask me how many employees in the store.

Q. You have six employees in the butcher department?

[fol. 169] A. That is correct.

Q. Now, again, you have said the store is closed from sundown on Friday until Sunday morning. Is that right?

A. That is correct.

Q. Why don't you open up at sundown on Saturday?

A. Well, because that wouldn't be very practicable. In the summertime you cannot open before 9 o'clock. That is the very time we close.

Q. How about wintertime?

A. Wintertime we could open before, yes; but it would be very, very unpractical.

Q. The only reason you don't do it is because you don't want to; is that correct?

A. It isn't that I don't want to. We have never done that, and we always do it the other way.

Q. As far as you know, if you wanted to open on any Saturday night after sundown, you could be open without violating your religious duties; is that correct?

A. That is correct.

Q. You have some figures here on gross sales. Have you figures on net sales?

A. No, I don't.

Q. So you don't know whether you made a profit or a loss on these days?

A. Yes, I do know.

[fol. 170] Q. How would you know?

A. I have good reason to know.

Q. You can't tell from looking at this book?

A. I can't tell from that one, no.

Q. So this is just a catchall book?

A. This is the business we do every single day.

Woodbury, CJ.: Those are daily gross sales?

The Witness: Those are daily, that is correct.

Q. How far back did this go? Do you know?

A. '57 that is.

Mr. Ehrmann: What was that date?

Woodbury, CJ.: '57, I think he said.

Mr. Elcock: July of '57.

Q. When did you open the super market?

A. Oh, August, 1953.

Q. Have you operated it on every Sunday since then?

A. Every day Sunday.

Q. You have no experience at all, then, as to what the business would be if you had operated on days other than Sunday?

A. That is correct.

Q. And you don't know what your profit is on Sunday?

A. No more than we make a profit. It's understood.

Q. You stated you were the gentleman who was prosecuted in the State Court.

A. Was I? Yes.

[fol. 171] Q. Yes. As a result, what led up to your prosecution, what was the situation involved? Do you recall?

A. I don't.

Q. Do you know who made the sales?

A. Who made them?

Q. Yes.

Magruder, Ch.J.: To whom you made them?

A. To whom? You mean the police? What do you mean?

Q. Did you make a sale as a result of which—

A. On a Sunday, you mean?

Q. On a Sunday.

A. I don't think it was me personally. One of my employees, yes.

Q. One of your employees did?

A. Yes.

Q. And you were prosecuted?

A. That is right.

Q. Do you know to whom he made the sale?

A. Offhand I don't remember. I mean, I don't know.

Q. Do you know whether it was to an Orthodox Jew or not—your sale?

A. No.

Mr. Elcock: No further questions.

McCarthy, DJ.: Mr. Witness, may I ask you to turn back to that book of yours and tell me what the receipts were [fol. 172] for the two weeks previous to May 1st, 1958, on Sunday?

Mr. Ehrmann: Let me help you.

The Witness: If it is a holiday week, we were only open three days.

Mr. Ehrmann: Just read May 13.

McCarthy, DJ.: No, I have asked previous to May 1st.

Mr. Ehrmann: This is April 13th [pointing]. Read this week and the next one.

The Witness: April 13th, on Sunday, we did $3,890.30.

McCarthy, DJ.: Now the following Sunday.

The Witness: The following Sunday, $3,365.

McCarthy, DJ.: Now on the following Sunday.

The Witness: $3,390.

McCarthy, DJ.: What date was that?

The Witness: The 27th.

McCarthy, DJ.: Now let me have the receipts for the next three weeks in May, after May 1st.

Mr. Ehrmann: Those are just Sunday receipts, if your Honor please?

McCarthy, DJ.: That is all I am asking.

The Witness: May 4th, $3,983.

McCarthy, DJ.: The next after that?

The Witness: $3,236.

McCarthy, DJ.: And the next after that?

The Witness: $3,807.

[fol. 173] McCarthy, DJ.: Those are the three weeks after this suit was brought. The suit was brought May 1st. And those are the figures for those three Sundays.

Magruder, Ch.J.: There may have been some period when you kept closed on Sunday, was there not?

The Witness: Yes, sir.

Magruder, Ch.J.: Because of the threat of prosecution.

The Witness: No, I never closed up.

Magruder, Ch.J.: You never did?

The Witness: No, I did not.

Magruder, Ch.J.: I thought Mr. Ehrmann said they made an agreement they would not enforce the statute against you pending this litigation, and I thought there must be some period when you closed per force of the threat.

The Witness: No, I never was.

Magruder, Ch.J.: You never closed?

The Witness: No.

Mr. Ryan: May it please your Honor, there was an injunction filed, a civil injunction in the Superior Court for Hampden County.

McCarthy, DJ.: Will you let us have your name?

Mr. Ryan: Yes. I am the City Solicitor for Springfield, Matthew Ryan.

When this case went to the Supreme Court, this criminal complaint, during the interim the attorney for the defen-

[fol. 174] dant Chernock filed an injunction, a preliminary injunction in the Superior Court for Hampden County, which was dismissed on November 3d by Judge O'Brien.

Woodbury, Ch.J.: That was after the Chernock case was decided.

Mr. Ryan: That was a long time after the decision of the Supreme Court—

Mr. Ehrmann: It was dismissed a long time after. The stipulation sets it out.

Mr. Ryan: That preliminary injunction was filed on June 18, 1954, I believe.

Mr. Ehrmann: Yes. And the injunction that is being discussed here was the injunction restraining further complaints against Mr. Chernock until the Massachusetts case had been terminated.

Woodbury, CJ.: That is as I understand it.

Mr. Ehrmann: Yes, that case was terminated quite a while ago but apparently the Chief of Police thought the injunction was still outstanding, whereas it had become moot, and then after that it was dismissed.

No more questions, Mr. Chernock.

May it please the Court, my brother raised a novel point as far as he is concerned, in contending that the sentence in Section 6 of Chapter 136 reading, "Nor shall it prohibit the performing of secular business and labor on the Lord's Day by any person who conscientiously believes that the [fol. 175] 7th day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby", has some bearing on keeping open a shop. That has been decided by the Massachusetts Court. *Commonwealth* v. *Has,* the case which has been so frequently mentioned here, held that that section did not apply to keeping open a shop. Then, later on, a Jewish butcher who kept and sold only kosher meat was prosecuted for keeping open his butcher shop on Sunday. He pleaded that he closed on Saturday. He sold only kosher meats. He closed on Saturday, according to his religious belief, and he pleaded this very language I have been talking about; and the Court —this is *Commonwealth* v. *Starr,* 144 Mass. 359—on page 361 ruled—

"The evidence shows that the defendant, who is a Hebrew, kept open his shop on the Lord's Day, for the purpose of selling meat to Hebrews. The Court correctly held that the facts that he was a Hebrew, who conscientiously believed that the seventh day of the week ought to be observed as the Sabbath, and that he actually refrained from secular business on that day, was immaterial. This point was fully considered and decided in *Commonwealth* v. *Has*, 122 Mass. 40.

The Court also correctly held that it was not competent for the defendant to prove that he kept open his shop for the sole purpose of selling meat to [fol. 176] Hebrews, and that this was a work of necessity or charity."

And the Court held that that was decided in *Commonwealth* v. *Dextra*, 143 Mass. 28, adversely to the claimant. So that those points have been decided.

McCarthy, DJ.: What happened in that case?

Mr. Ehrmann: The conviction stood.

McCarthy, DJ.: That is right.

Mr. Ehrmann: He sold nothing but kosher meat, and the conviction stood.

McCarthy, DJ.: Did he sell kosher meat to Orthodox Jews?

Mr. Ehrmann: It doesn't say they were Orthodox. It says he sold kosher meat to Hebrews.

McCarthy, DJ.: That is right.

Mr. Erhmann: So that this is no longer a matter for us to consider because the Massachusetts Supreme Court has already construed this statute. We may think it was wrong but it has construed it, and that phrase has nothing whatever to do with keeping a shop open. The only language in the entire section that talks about a shop open and permits a shop to be kept open is the keeping open of a shop on the Lord's Day for the sale of kosher meat between the hours of 6 and 10 o'clock in the forenoon provided he closes on Saturday. That is all there is. And this discussion we have had indicating that an Orthodox [fol. 177] Jew could sell meat all day if he wanted to just

isn't the law. Perhaps it should be, but under the construction we have in Massachusetts it just isn't the law. That is all he concluded or else he wouldn't be here.

McCarthy, DJ.: Do you agree to that, Mr. Elcock?

Mr. Elcock: No, your Honor, I don't. If I could express my opinion on it, the prosecutions were ones where the sales were not limited, and that was the precise problem in this super market case.

Mr. Ehrmann: Also it sold after 10 o'clock. The case rested partly on *Commonwealth* v. *Has*, which had nothing to do with selling kosher meats. Neither did the case in 144 have anything to do with selling kosher meats.

Now, in the stipulation it was agreed that we may show to the Court a pamphlet issued by the Union of Orthodox Jewish Congregations of America, Rabbinical Council of American Jews; and the only reason why I am offering this to the Court as a guide to the Court, is simply to indicate how very complex these laws of Kosher are. To many of us they seem very simple. Why can't you do this? Why can't you do that? How these Orthodox co-Religionists of mine can cling to their devotion and all the difficulties that they have in their diet, as well as the difficulties engendered by Sunday, is beyond me because it just expresses a devotion to their faith which is superhuman; but you will see from that the things that are required before [fol. 178] they can eat food according to their religious customs. That is the sole purpose of introducing it. It has no bearing on this case except as background material.

Magruder, Ch.J.: Is that all?

Mr. Ehrmann: That is all we have, thank you.

Mr. Elcock: That is all.

Magruder, Ch.J.: The Court will take the matter under advisement.

Mr. Ehrmann, do you want to file any brief?

Mr. Ehrmann: We just got a brief, we just received a brief and haven't opened it.

Magruder, Ch.J.: If you want to file a brief, do it by tomorrow.

Mr. Ehrmann: Yes, thank you.

McCarthy, DJ.: Do you want to file a reply brief?

Mr. Elcock: I don't think so, your Honor. There is adequate material here, and I don't think in the brief there are points which haven't been raised in evidence. I think everything has already been covered.

[The Court recessed at 3:30 p.m.]

[fol. 179] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 180]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,
Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and President of the Massachusetts Council of Rabbis, suing on behalf of himself and other Rabbis similarly situated, Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, Defendant.

Before Magruder and Woodbury, Circuit Judges, and McCarthy, District Judge.

Herbert B. Ehrmann, Samuel Markell, Edward L. LaVine, Goulston & Storrs, Irving S. Ribicoff, David Kotkin, Ribicoff and Kotkin, Samuel L. Fein, Fein, Cavanaugh & Kimball, for Plaintiffs.

S. Thomas Martinelli, Assistant City Solicitor; Matthew J. Ryan, Jr., City Solicitor; John J. O'Connor, Assistant City Solicitor, for Defendant.

Joseph H. Elcock, Jr., Assistant Attorney General; Edward A. McCormack, Jr., Attorney General, for the Commonwealth of Massachusetts.

Leo Pfeffer, for the International Religious Liberty Association; Howard S. Whiteside, for the Southern New England Conference of the Seventh Day Adventists; Henry M. Leen, for the Archdiocesan Council of Catholic Men; Herbert S. Avery, for the Lord's Day League of New England,

Amici Curiae.

[fol. 181]

OPINION OF THE COURT—May 18, 1959

Magruder, Circuit Judge. It is always an unpleasant task for a lower federal court to sit in review upon the constitutionality of state legislation, sometimes a three-judge district court can find no escape from doing that, under 28 U.S.C. §§ 1331, 1343, 2281 and 2284. We believe the present to be such a case.

The attack which we have to consider is upon the validity, under the Federal Constitution, of the modern version of what started as one of the famous "blue laws" enacted by the Great and General Court of Massachusetts in colonial days. Specifically, we refer to the so-called "Lord's day" statute, still on the books in Massachusetts. So far as we are aware, the Supreme Judicial Court has had no occasion to pass on the validity of this statute under the Federal Constitution, though that court has, rather gingerly and briefly, upheld the statute against attacks based upon the state constitution. See *Commonwealth* v. *Has*, 122 Mass. 40 (1877); Commonwealth v. Chernock, 336 Mass. 384 (1957).

The Federal complaint now before us seeks a declaration that certain provisions of the "Lord's day" statute of Massachusetts are unconstitutional, as applied to the plaintiffs. Preliminary and final injunctions restraining the defendant, the Chief of Police of the City of Springfield, from enforcing against the plaintiffs the criminal provisions of the law were asked for. A three-judge court was designated to hear the suit, pursuant to the provisions of 28 U.S.C. §§ 2281 and 2284. The motion for a preliminary injunction was not pressed, after the parties had informally agreed that the plaintiffs would not be prosecuted until after decision of this case. The defendant filed a motion to dismiss, which was consolidated with the hearing on the merits before this court.

[fol. 182] Counsel for the Commonwealth has appeared to oppose the relief prayed, and by leave of court consolidated briefs were filed on behalf of two pairs of amici curiae, The Lord's Day League of New England and the Archdiocesan Council of Catholic Men, arguing that the statute should be upheld, and the International Religious Liberty Association, together with the Southern New England Conference of Seventh Day Adventists, urging that the statute is unconstitutional.

Joined as plaintiffs were Crown Kosher Super Market of Mass., Inc., a corporation operating a kosher supermarket in Springfield, Massachusetts, three named customers thereof, suing on behalf of themselves and others similarly situated, and a rabbi suing on behalf of himself and other rabbi similarly situated.

Most of the facts were stipulated by the parties, but some additional oral and documentary evidence was presented by the plaintiffs at the hearing before us.

The corporate plaintiff's supermarket (hereinafter called the Crown Market) offers for sale all categories of food ("one stop shopping"); all of its meats and meat products are kosher, and something like 95 per cent of the rest of its stock is kosher. The Crown Market is the only store of this kind in the area of Springfield; apparently it is the

only one within 26 miles or more.[1] But Springfield has several kosher butcher shops and some delicatessen shops and supermarkets which sell certain kosher products.

The four officers and stockholders and the six directors of the corporate plaintiff are all adherents of the Orthodox Jewish faith, who duly observe the Jewish Sabbath, from [fol. 183] sundown Friday to sundown Saturday. A very substantial percentage of the corporate plaintiff's customers are Orthodox Jews, and most of the others are Conservative Jews who observe the Jewish Sabbath.

The due observance of the Jewish Sabbath requires total abstinence from business and work of even the most trivial sort. Any riding in automobiles or other conveyances and walking extraordinary distances are forbidden. With particular reference to this case, the religious belief of the officers, directors and stockholders of the corporate plaintiff completely precludes the operation of the store on the Jewish Sabbath, since that would be doing business vicariously and causing others to work on the Sabbath. The large majority of Crown Market's customers, who share these beliefs, may not shop on the Sabbath, nor may they cook. Preparation for meals during the 24 hours of the Jewish Sabbath, and especially for the traditional family feast on Friday night, consumes most of the daylight hours on Friday.

It follows that the Crown Market (like other kosher stores) is not open for business between sundown Friday

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[1] The testimony that the nearest similar store was in Hartford, Connecticut (about 26 miles to the south), was not rebutted, and is corroborated by the fact that the list of customers attached to the complaint contains names of persons coming from the following towns in addition to Springfield (approximate distance and direction from Springfield are noted parenthetically):

Brattleboro, Vt. (60 mi. N)
Pittsfield, Mass. (53 mi. WNW)
Athol, Mass. (50 mi. NE)
Turners Falls, Mass. (43 mi. NNE)
Greenfield, Mass. (39 mi. N)
Ware, Mass. (25 mi. ENE)
Holyoke, Mass. (12 mi. NNE)
Westfield, Mass. (9 mi. W)
Enfield, Conn. (9 mi. S)
Agawam, Mass. (4 mi. SSW)
Longmeadow, Mass. (3 mi. S)
W. Springfield, Mass. (3 mi. W)

and sundown Saturday, and on thirteen Jewish holidays each year. Even if the store were open on Saturday, the great majority of its patrons could not take advantage of it, just as they cannot take advantage of the other stores which are open Friday night and Saturday and sell some kosher food. Business considerations make operation on Saturday night impracticable. If, after sundown, the store were prepared for business (for instance, by cutting meat) and were then opened, few hours would remain before a suitable closing time; the twelve store employees (six of whom are butchers) would demand extra wages for their trouble, and most customers would find it inconvenient, if [fol. 184] not impossible, to shop during those night hours, especially those who would have to travel significant distances starting after sundown.

But it is common knowledge that the normal pattern of a grocery store's business shows a gradual increase in volume, from very little business on Monday to somewhat more during the day of Friday. The stores are jammed and a vast amount of business is done on Friday evening and Saturday. Since the Orthodox and Sabbath-observing Conservative Jews, such as the customers of the corporate plaintiff, cannot shop on Friday night or Saturday, and they have spent the Sabbath as a day of rest or religious celebration and family communion, Sunday is the only day which has for them the advantages as a shopping day that Saturday has for the majority of the people.

Under these circumstances, it is not surprising that more than one third of Crown Market's gross sales each week are made on Sunday. It would not be practicable for Crown Market to sell only kosher meat from 6 A.M. to 10 A.M. on Sunday, as permitted by law, for economic reasons similar to those preventing operations on Saturday night after sundown. The few sales would not justify the great expense.

The Crown Market is open for business from 8 A.M. to 6 P.M. every Sunday, and has been open every Sunday (excluding Jewish Holidays) since it was established August 18, 1953. It thus has been and is violating the statute, the constitutionality of which is being attacked in this proceeding. The manager of the Crown Market (who is also the corporate plaintiff's president and owns 50 percent of the

stock thereof) was convicted of violation of the challenged provisions of the Lord's day law in the Massachusetts state court. His exceptions in that trial, which questioned the constitutionality of the law under the state constitution but raised no federal constitutional issue, were overruled [fol. 185] by the Supreme Judicial Court. *Commonwealth* v. *Chernock*, supra, 336 Mass. 384 (1957). Even if the defendant had pleaded res judicata (which he has not, see Rule 8(c), F.R.C.P.), it seems obvious enough that the corporate plaintiff is not bound by *Commonwealth* v. *Chernock*, nor is any of the individual plaintiffs.

The defendant threatens to enforce the law to the full extent of his authority. Thus it must be taken that he will institute repeated criminal prosecutions against the corporate plaintiff, its four officers and stockholders, and its six directors and twelve employees, for each violation, that is, for each Sunday on which Crown Market is open for business.

Two of the three named customer-plaintiffs are residents of Springfield and the third is a resident of Turners Falls, 43 miles to the north. All are Orthodox Jews who are regular customers of the corporate plaintiff's store. These three customers adequately represent a class of Orthodox Jewish people of the area served by the corporate plaintiff's store; they seek to enforce, by obtaining a common relief, their several rights which depend, however, on common questions of law and fact within the meaning of Rule 23(a)(3), F.R.C.P.

The named plaintiff-rabbi is the Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and is the president of the Massachusetts Council of Rabbis. He has been duly authorized by the latter organization to represent it in the prosecution of this action. Besides his religious duties as leader and teacher of his congregation, this rabbi has the duty (which he may and in fact does discharge through an inspector appointed by him) of inspecting Kosher Markets and butcher shops daily except on the Jewish Sabbath to ensure compliance with Jewish dietary laws. The inspector comes to the Crown Market at 8 A.M. on Sunday for the washing of any meat from animals slaughtered on the previous Thursday which is on

hand. Among the dietary rules enforced is that fresh meat [fol. 186] must be rewashed every 72 hours, that only meats and seafood of certain kinds and quality may be eaten, and that meat and dairy products must not be commingled, even by the use of the same implements for both. We think that the plaintiff-rabbi adequately represents a class, and that this class seeks to enforce by a common relief certain common rights and certain several rights which depend upon common questions of law and fact within the meaning of Rule 23(a)(1) and (3), F.R.C.P.

Preliminarily the defendant relies upon a point of equity jurisdiction based upon the justifiable reluctance of federal courts of equity to interfere by way of injunction with the operation of a state criminal statute. As stated in *Spielman Motor Sales Co., Inc.*, v. *Dodge*, 295 U.S. 89, 95 (1935), "there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." In *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), in which similar language occurs, the actual decision was that the bill should be dismissed for "want of equity", since an injunction against enforcement of the ordinance was unnecessary because, in parallel litigation, the Supreme Court had already adjudicated that the ordinance was unconstitutional. *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

It would be nice if we could say to these plaintiffs, "Go ahead and violate the challenged statute, and urge your defense based upon federal constitutional grounds in the course of the state court proceeding." But the matter is not so simple as that. It seems clear, from the recent decision in Evers v. Dwyer, 358 U.S. 202 (1958), that when enforcement of a state criminal statute results in the denial of civil rights of a citizen and the state officials intend to enforce the statute unless and until its unconstitutionality has been finally adjudicated, a three-judge district court [fol. 187] may not decline as a matter of discretion to take jurisdiction of a suit to enjoin the operation of the statute. Furthermore, this argument by the defendant really relates only to the corporate plaintiff. Because there is an exception in the statute that permits persons situated as are the plaintiff-customers and the plaintiff-rabbis to perform "sec-

ular business and labor" on Sunday, these particular individual plaintiffs cannot, either by shopping at the corporate plaintiff's store or by inspecting it, or by any other act in the capacities in which they appear here, violate the Sunday law. It is evident that for them the *only* method by which they can vindicate the constitutional rights claimed is by obtaining equitable relief.

As stated in the complaint, the grounds for challenging the Sunday law are all founded upon the Fourteenth Amendment. Simply stated, these are: (1) That the Lord's Day law is a law respecting the establishment of religion and denying the free exercise of religion and hence is violative of the due process clause of the Fourteenth Amendment. See *Douglas* v. *City of Jeannette*, supra, 319 U.S. at 162; (2) that the statute deprives the corporate plaintiff of its property and the other plaintiffs of their liberty arbitrarily and therefore is a denial of due process of law guaranteed by the Fourteenth Amendment; and (3) that the statute denies the corporate plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. It can hardly be disputed that the corporate plaintiff has standing to assert the grounds numbered 2 and 3 *supra*, and that the individual plaintiffs have standing to assert the grounds numbered 1 and 2 *supra*. If we were required to go into the matter, which we are not now, we would be prepared to hold that the facts of this case bring it squarely within the exception to the Supreme Court's "rule of practice" forbidding one party to assert somebody else's con- [fol. 188] stitutional rights, so that all plaintiffs could argue all grounds. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Pearl Assurance Co., Ltd.* v. *Harrington*, 38 F. Supp. 411 (D. Mass. 1941), aff'd 313 U.S. 549 (1941); *Bartels* v. *Iowa*, 262 U.S. 404, 410-11 (1923); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

It is clear that the first Sunday law, enacted in 1653, and the various modified versions thereof also enacted in the colonial period, had the religious purpose to compel a seemly observance of that day of the week celebrated as the Sabbath (Sunday) by the dominant Christian sect. See Colonial Laws of Mass. 132-33, 134; Mass. Bay Province Acts 1692-93, c. 22; 1716-17, c. 13; 1727-28, c. 5; 1760-61,

c. 20. See also the codification of 1782, passed by the legislature assembled under the constitution of the Commonwealth of Massachusetts. Mass. Acts 1782, c. 23. These enactments were prior to the adoption of the Constitution of the United States and long before the adoption of the Fourteenth Amendment.

In enactments subsequent to the creation of the Federal Union, the Massachusetts legislature began to eliminate some provisions from the earlier prohibitory clauses of its Sunday laws. See Mass. Acts 1791, c. 58; R.S. 1836, c. 50.

In 1858 the legislature, apparently yielding to various pressure groups, commenced the practice of writing in various exceptions to the general prohibition against secular activities on the Lord's day, which has resulted in amendments by some seventy-odd different enactments.[2]

The result of all this is that the Sunday Law, as it now exists on the books, is an almost unbelievable hodgepodge. Chapter 136 of the Massachusetts General Laws, entitled [fol. 189] "Observance of the Lord's day", contains in §5 the general prohibition which defendant is threatening to apply to the plaintiffs: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars." (There is no doubt that the "Lord's day" as used in the statute means Sunday.) Then §6 and the succeeding sections contain miscellaneous exceptions and qualifications, none of which do these plaintiffs any good. One of such exceptions might have seemed as an original matter to be applicable to the corporate plaintiff. It is provided in one

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[2] Mass. Acts 1858, c. 151; 1881, c. 119; 1886, c. 82; 1887, c. 391; 1893, c. 41; 1895, c. 434; 1897, c. 389; 1900, c. 440; 1901, c. 80; 1902, c. 414; 1904 c. 460; 1906, c. 139; 1908, cc. 123, 126, 273, 333, 343, 354, 385, 537; 1909, cc. 420, 423; 1910, c. 327; 1911, c. 328; 1914, c. 757; 1916, c. 146; 1917, c. 207; 1918, c. 257; 1920, cc. 141, 240; 1922, c. 119; 1928, cc. 234, 406; 1929, c. 118; 1930, cc. 90, 143, 179; 1931, cc. 41, 71, 174, 176, 240, 275, 426; 1932, cc. 96, 105; 1933, cc. 150, 309; 1934, cc. 55, 63, 354; 1935, cc. 78, 104, 169; 1936, c. 129; 1937, c. 286; 1938, cc. 60, 143; 1943, c. 473; 1945, c. 575; 1946, cc. 207, 318; 1948, c. 119; 1949, c. 190; 1950, cc. 256, 322, 681; 1951, cc. 32, 504; 1954, cc. 132, 217; 1955, cc. 255, 304, 524, 742; 1956, cc. 11, 157, 212, 256.

part of §6: "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby". But the Supreme Judicial Court has held, and of course that court's interpretation of the state statute is binding upon us, that this particular exception does not excuse the separate offense of keeping one's shop open on the Lord's day, although the defendant in conscience believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business on that day. *Commonwealth* v. *Has*, supra, 122 Mass. 40. To the same effect see *Commonwealth* v. *Kirshen*, 194, Mass. 151 (1907); *Commonwealth* v. *Starr*, 144 Mass. 359 (1887).

Much is made by the defendant of the following extract from the opinion of the Supreme Judicial Court in *Commonwealth* v. *Has*, supra, 122 Mass. at 42:

> "This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open [fol. 190] question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week

> may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community."

This description of the Massachusetts Sunday law as being merely a "day-of-rest" statute, enacted pursuant to the police power, is answered by an examination of the statute, particularly those numerous provisions which permit various activities on Sunday, which certainly are not "works of necessity and charity", at specified hours and places designed not to affront godly persons worshipping in their churches during the usual morning hours. Moreover, the exceptions, permitting a great variety of functions on Sunday, are not by §6 made conditional upon the observance of some other day in the week as a day of rest. In fact there is on the statute books a wholly separate requirement, Mass. G. L. c. 149 §48, imposing upon employers of labor the obligation to see to it that their employees are allowed "at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days." The characterization of the Sunday law as being merely a civil regulation providing for a "day of rest" seems to [fol. 191] have been an *ad hoc* improvisation in *Commonwealth* v. *Has*, supra, because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state constitution if the religious motivation of the statute were more explicitly avowed. At any rate, that characterization of the statute is contradicted by other pronouncements of the Supreme Judicial Court both before and after the date of the decision in *Commonwealth* v. *Has*. See, for instance, *Pearce* v. *Atwood*, 13 Mass. 324, 345-46 (1816); *Bennett* v. *Brooks*, 91 Mass. 118, 121 (1864); *Davis* v. *City of Somerville*, 128 Mass. 594, 596 (1880); *Commonwealth* v. *White*, 190 Mass. 578, 580-81 (1906). In the last-

named case, blissfully ignoring what was said in *Commonwealth* v. *Has*, the Supreme Judicial Court said:

"In construing this statute it is to be borne in mind that so far as material to the question before us, it is simply the continuation of a law which from a very early time in the history of the Colony has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance are set forth in the various preambles to those statutes. One of these is in the following language: 'Whereas it is the duty of all person, upon the Lord's Day, carefully to apply themselves, publickly and privately, to religion and piety, the prophanation of the Lord's Day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons; therefore,' etc. See Prov. St. 1760-61, c. 20 §1; 4 Prov. Laws, (State ed.) 415. Perhaps the most instructive preamble is that which precedes St. 1791, c. 58, which was the first general statute passed on this subject after the adoption of our State Constitution. It reads as follows: 'Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge [fol. 192] of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society: to the great disturbance of well disposed persons, and

> to the great damage of the community, by producing dissipation of manners and immoralities of life: Be it therefore enacted,' etc. Such was the idea of the Lord's day for the observance of which this system was devised."

In fact, the joint brief filed by The Lord's Day League of New England and the Archdiocesan Council of Catholic Men "lets the cat out of the bag", so to speak, in the following statement: "Each organization has various aims and purposes, but have, in common, the purpose of preventing the further secularization and commercialization of the Lord's Day."

Fortunately, in passing upon the constitutionality of the state statute, we do not have to accept the characterization of it made in *Commonwealth* v. *Has*, supra. See *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955).

It seems to us that all the objections which have been taken under the Fourteenth Amendment to the constitutionality of the statute in question are well taken.

As to the freedom of religion provisions of the First Amendment which the Supreme Court has explicitly told us have been incorporated into the due process clause of the Fourteenth Amendment and have thus become binding on the states, see *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940); *Douglas* v. *City of Jeannette*, supra, 319 U.S. 157, 162 (1943); *Thomas* v. *Collins*, 323 U.S. 516 (1945).

We may start with the classic statement from *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither [fol. 193] can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can

be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States*, [98 U.S. 145 (1878)] at 164."

To the above may be added the statement by the Court in the *Everson* case (330 U.S. at 18):

"State power is no more to be used so as to handicap religions than it is to favor them."

What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group. It is clear that by denying to the plaintiffs the liberty to work, shop, or pursue other "secular" conduct on Sunday, the law puts an economic penalty upon a person observing as his Sabbath some other day than Sunday by depriving him of the productive use of one further day of the week. In other words, whereas ordinary grocery stores are open six days a week, if the challenged law is constitutional the Crown Market can be open only five days, and none of these five days would include a day of the week end, when a large percentage of the week's sales is normally obtained. Even assuming that the Crown [fol. 194] Market could stay in business on such a basis, it could do so only under great handicap as against other supermarkets. Crown Market's Orthodox customers also lose much of the value of their Sunday under the same penalty, since if the law is constitutional they may not shop on either Saturday or Sunday. Without doubt if they remain faithful to their religious convictions, they will be under a very substantial disadvantage as compared with

shoppers whose Sabbath is observed on Sunday. The rabbi-plaintiffs would be hindered in their function of supervising the food to be eaten by the members of their congregations, and they would also suffer great detriment in their efforts to preserve, in these circumstances, due observance of the Jewish Sabbath and of the dietary laws by them.

For reasons closely related to those just set forth, the objection is well taken that, in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of liberty, without due process of law, contrary to the Fourteenth Amendment.

We think in addition that, on the decided cases, the discriminations apparent on the face of the statute constitute a denial of the equal protection of the laws, forbidden as well by the Fourteenth Amendment. See *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *City of Springfield* v. *Smith*, 322 Mo. 1129, 19 S.W. 2d 1 (1929); *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P.2d 141 (1938); *City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E. 2d 52 (1938); *Ex parte Hodges*, 83 P.2d 201 (Okla. Cr. 1938); *Arrigo* v. *City of Lincoln*, 154 Neb. 537, 48 N.W. 2d 643 (1951); *Henderson* v. *Antonacci*, 62 So. 2d 5 (Fla. 1952).

[fol. 195] Without elaborating the many discriminatory exceptions, two vices may be noted as examples: The statute does not generically forbid the keeping open of a store on Sunday to sell food, but it just limits this liberty to selected types of stores.[3] Employees of the favored stores

[3] (1) Bakers and their employees may sell during specified hours any food customarily sold by them, and milk as well. (2) Persons who raise fruits and vegetables and their agents may sell the same and milk also on any property they own, during all hours on Sunday. (3) Licensed innholders and licensed common victualers may sell frozen desserts, frozen dessert mix, confectionery, soda water, milk and tobacco on Sunday, and during certain hours may sell bread. (4) Persons who sell fruit, frozen desserts, frozen dessert mix, confectionery and soda water "on secular days" and are especially licensed, may sell the same and milk all day Sunday, and

are not less in need of rest than those of the Crown Market, nor does any reason appear why the operation of those stores is less calculated to disturb the rest of citizens than do the operations of the Crown Market. And many classes of work which are excepted are surely no less destructive of public rest and relaxation than the opening of the Crown Market would be.[4]

We ought to comment briefly on two Supreme Court cases much relied upon by the defendant.[5] In Hennington

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during certain hours may sell bread. (5) Druggists may sell confectionery, soda water, frozen desserts, frozen dessert mix, milk and tobacco during all hours on Sunday. (6) News dealers whose stores are open every other day of the week (thus excluding Sabbath-observing Jews) may sell milk and tobacco at all times on Sunday. (7) Shops operated and staffed by persons who because of conscientious beliefs duly observe Saturday as the Sabbath may sell kosher meat and milk *only until 10 A.M.*

[4] For instance, the persons operating the Crown Market (or the plaintiff customers) could dig ditches, or do any other type of labor, if that were their ordinary calling, and apparently could even vend food outside the store building. Moving such business indoors can not reasonably be thought to make it more disruptive of a day of rest and recreation.

Other provisions are equally whimsical: When Rosh Hashonah or Yom Kippur begins at sundown Sunday, fish, fruit and vegetables may be sold until 12 noon; but kosher meat may only be sold until 10 A.M. One may dig for clams on Sunday, but may not dredge for oysters. All professional sports are permitted (under certain conditions) from 1:30 to 6:30 P.M., and hockey, basketball and baseball may run much longer; but amateur sports are tolerated (under the same conditions) only between 2 and 6 P.M. Bowling alleys at amusement parks may open until 12 midnight, whereas other bowling alleys must close at 11 P.M.

[5] In another case, Friedman v. New York, 341 U.S. 907 (1951), the United States Supreme Court without opinion dismissed, for lack of a substantial federal question, an appeal from a decision by the New York Court of Appeals upholding a "Sunday law" of that state upon the ground that the statute simply provided in reasonable terms for a day of rest. People v. Friedman, 302 N.Y. 75, 96 N.E. 2d 184 (1950). That case is clearly distinguishable from the one at bar; the statutes attacked are quite different. The New York law has few characteristics or roots in history tending to indicate that it is a religious regulation; and the New York courts have consistently interpreted it as a civil regulation, whereas the Massachusetts statute has most often been construed as a reli-

v. Georgia, 163 U.S. 299 (1896), the only claim considered [fol. 196] by the Court was that, under the commerce clause, a state could not prohibit the running of a railroad train in interstate commerce on Sunday. The Court held simply that congressional silence could not foreclose the field to state regulation. The opinion assumed that the statute was the purpose of securing a day of rest, as the Georgia Supreme Court had held, and reasoned from this premise (163 U.S. at 307). Also, it may be pointed out that this is a pretty old case, which was decided before the modern development of limitations upon the powers of the states implicit in the Fourteenth Amendment. In Petit. v. Minnesota, 177 U.S. 164 (1900), the Supreme Court did affirm a conviction under a Minnesota statute prohibiting all labor on Sunday "excepting the works of necessity or charity." The statute contained the provision that keeping open a barber shop on Sunday "shall not be deemed a work of necessity or charity." The Court sustained the conviction of the defendant barber on alternate grounds: (1) That "necessity or charity" did not as a matter of fact include barber shops, so that the proviso really added nothing, and (2) even if barber shops might otherwise be excused from closing, it could not be said that the classification in the circumstances was unreasonable, since courts will take judicial notice of the fact that, in view of the custom of keeping barber shops open in the evening as well as in the day, the employees in them work more, and during later hours, than those engaged in most other occupations.

This opinion shall constitute the findings of fact and conclusions of law in accordance with Rule 52(a), F.R.C.P. [fol. 197]. The form of our decree pursuant to the foregoing opinion will be settled by counsel upon due notice.

McCarthy, District Judge, dissents from the opinion and judgment of the Court, and will file a dissenting memorandum at a later date.

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gious law. Nor does the New York statute contain such prolix and irrational exceptions to its prohibitions as those which dominate the Massachusetts statute before us. Perhaps this is why counsel supporting the statute in the present case have placed such slight reliance on the *Friedman* case.

[fol. 198] [File endorsement omitted]

[fol. 199]

DISSENTING OPINION—June 4, 1959

McCarthy, D. J. (Dissenting). The plaintiffs here, a corporation and some individuals who are officers, stockholders or allegedly customers of the corporate plaintiff, and an Orthodox Jewish rabbi, sought by complaint to have a statutory three-judge court convene to determine the constitutionality of Section 5 of Chapter 136 of the General Laws of the Commonwealth of Massachusetts. The defendant is the Chief of Police of the City of Springfield wherein the corporate plaintiff has its place of business. The court permitted one joint amicus curiae brief to be filed by intervening parties for each side of the question.

The plaintiffs filed a motion for a preliminary injunction which was never acted upon by the court. The defendant filed a motion to dismiss. As the record in this case will show, the hearing was devoted largely to arguments in the motion to dismiss. Some evidence was taken on the merits and various stipulations were filed with the court.

I am in complete disagreement with my colleagues on the court as to what constitute the facts in this case. The corporate plaintiff is managed by one Chernock, who is a director and the owner of 50% of its stock. In 1957 the Supreme Judicial Court of Massachusetts affirmed a judgment of conviction against Chernock on three complaints charging him with a violation of the precise section of the General Laws of Massachusetts, the constitutionality of which has been challenged in this proceeding. *Commonwealth* v. *Chernock*, 336 Mass. 384. In the state proceedings the cases were submitted to the Supreme Court on an Agreed Statement of Facts which differs radically from what has been accepted by this Court as the basic facts in issue.

[fol. 200] Paragraph 5 of the complaint alleges that the corporate plaintiff is . . . "selling food to Orthodox and Conservative Jewish persons, prepared in accordance with the tenets of their religion." Paragraph 11 of the complaint alleges that "Crown Market is a completely Kosher Supermarket". The foregoing allegations and other language in

the complaint would lead one to believe that the corporate plaintiff is engaged exclusively in the sale of Kosher meats and foodstuffs having a religious significance. In support of the allegations of the complaint, Chernock testified that he was the owner of 50% of the stock of the corporation and that approximately 95% of its sales were of Kosher foods. Chernock further testified that some foodstuffs were sold to non-Jewish customers on Sundays.

On the other hand in the case of *Commonwealth* v. *Chernock* (supra), the Massachusetts Supreme Judicial Court in its opinion stated as follows at page 385: "The cases were submitted on the following agreed facts. The defendant conducts a combination *Kosher* and *Super Market* which, because of its religious convictions is closed to business every Saturday and Jewish holiday, but remains open to business on Sundays. On the days specified in the complaint, which were Sundays, the plaintiff kept his market open after 10:00 o'clock in the forenoon and until closing time and did sell *to the public* Kosher meats, *bakery goods, vegetables* and *canned goods of all types.*" (emphasis added)

It is most disturbing to observe the discrepancies between the allegations of the complaint in this case and the agreed upon facts in the state court case. Quite obviously both cases are concerned with the same market and the same individual in the person of Chernock.[1] The inference from

[1]The defendant's bill of exceptions in the state court cases establishes the identity of the defendant in that case with the plaintiff in the instant case. For example, the defendant therein filed a motion to dismiss which was captioned "Commonwealth v. Harold Chernock D/B/A Crown Market". The defendant's brief in that case under the heading "Issue No. 2" raised the same issues that are raised here, namely, freedom of religion and equal protection of the law under the Massachusetts Constitution and Declaration of Rights. The same defenses under the First and Fourteenth Amendments were available to the defendant in the state court case. After conviction in the Superior Court of Massachusetts (the trial court), a bill of complaint was brought in that court by the defendant for the purpose of restraining the authorities from enforcing the law pending the outcome of an appeal to the Supreme Judicial Court. It is noteworthy that the petitioner in that complaint is "Crown Kosher Super Market of Mass., Inc. alias Harold Chernock D/B/A Crown Market". Copies of these documents are being filed in the Clerk's office of the U. S. District Court at Boston.

[fol. 201] the language of the complaint is that the corporate plaintiff is engaged exclusively in the business of selling Kosher meat and Kosher food products—as witness the words "a completely Kosher market". On the other hand, the agreed statement of facts in the state court case make it clear that the market sells to the public all kinds of vegetables, groceries and bakery goods in addition to Kosher meats and Kosher foods—as witness the words "a combination Kosher and Supermarket". There are no limitations in the corporate plaintiff's charter, a certified copy of which I am annexing to this opinion, as to the character of foods it may sell. It would appear to me that in a case of this magnitude involving as it does the striking down of a state statute, there should be no doubt or confusion as to the facts. The court should know whether this market is a store for the sale of religious foods, if one may use that expression, or whether it is a super market selling all kinds of food to the general public. If it be the latter, as is indicated by the agreed statement in the state court case, then the fears expressed in the majority opinion that the religious rights of some persons are not being safeguarded may be laid at rest. In that event we need look no further to find the reason for the great volume of sales on Sundays, which would appear to be the very obvious reason that the corporate plaintiff's competitors are closed on Sundays observing the general day of rest prescribed by the laws of Massachusetts. It is therefore my opinion that if the decision in this case is to turn in any degree on [fol. 202] the factual situation, the interests of justice would best be served by reopening the case in this court for the purpose of taking testimony to establish the truth.

On the assumption that the alleged facts accepted by the court as to the nature and extent of the corporate plaintiff's business are of no significance, and on the further assumption that the sole issue before the court is whether or not the Commonwealth of Massachusetts may constitutionally enact a statute providing for the general closing of shops, warehouses and workhouses on Sunday, then I would allow the motion to dismiss on the basis that this Court will not and should not exercise its equitable powers to prevent enforcement of a state criminal statute where

an adequate means to test the validity of the statute in the state court exists. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89. The complaint before the Court does not allege that irreparable harm will be suffered by the plaintiffs if this Court should refer the plaintiffs to their remedies in the state court and before the Supreme Court of the United States by way of certiorari.

The majority would exercise equitable power on the basis of the holding in *Ewers* v. *Dwyer*, 358 U.S. 202, to the effect that a three-judge district court may not decline to take jurisdiction of a suit to enjoin operation of a state criminal statute where the enforcement of the statute results in the denial of civil rights of a citizen and the state officials intend to enforce the statute. Assuming, only for the moment, that enforcement of the state statute in question could deprive one of the alleged plaintiffs of a civil right it is apparent from the stipulation of fact filed by the parties and from the majority opinion itself that the state court stands ready [fol. 203] to enjoin enforcement of the statute pending adjudication and that the defendant stands ready to refrain from enforcing the statute pending adjudication.

The majority opinion further admits that this concerns only the corporate plaintiff for the individual plaintiffs, under existing Massachusetts law, cannot be charged with violation of this statute. The majority make a very tenuous argument that the only way that the individual plaintiffs may "vindicate the constitutional rights claimed is by obtaining equitable relief." The so-called constitutional right claimed by the individual plaintiffs is the asserted right to purchase food at any hour and this asserted right allegedly flows from the constitutional rights to liberty and to the free exercise of religion. In essence the sole complaint of the individual plaintiffs is that it is inconvenient to be unable to shop at all hours on Sunday. This was frankly admitted by counsel for the plaintiffs in argument. (Transcript p. 50, p. 61,) I believe that the individual plaintiffs are before the Court as "window dressing" to enable the corporate plaintiff to rely upon arguments that freedom of religion has been infringed and thereby help the corporate plaintiff to gain a commercial competitive advantage. For these reasons I would hold that none of the

alleged plaintiffs has presented an infringement of a substantial right and that the requirements of *Evers* v. *Dwyer*, supra, have not been met. I would relegate the plaintiff corporation and alleged plaintiffs to the state courts for their remedies.

Since the majority opinion goes to the merits of the case I feel that I would be remiss in my duties if I did not state my views upon the merits.

There are two basic issues here presented:

1. Is the statute in question religious in nature?

[fol. 204] 2. If not religious in nature does the statute violate the equal protection clause of the Fourteenth Amendment?

McCollum and *Everson* make it clear that a statute which aids a religion or all religions or no religion or favors one religion over another is unconstitutional as a violation of the Fourteenth Amendment. Those cases both turn upon the question of the expenditure of public funds in aid of religion. On this point they are distinguishable. The cases do not declare unconstitutional a legislative enactment which recognizes the existence of a Supreme Being. The "high wall of separation" imported into those cases is fiscal in nature.[2]

Many examples of constitutional enactments recognizing the existence of a Supreme Being or of organized religion could be cited. A few are: the appointment of chaplains for the Armed Forces and for houses of legislature; the words "In God We Trust" upon currency; the inclusion of "under God" in the pledge of allegiance; draft exemptions for clergymen and conscientious objectors; tax exemptions for religious organizations.

The statute before the Court is not religious in nature in the sense of *McCollum* and *Everson*. It provides for no expenditure of public funds in furtherance of any or all religions.[3] It compels no religious observation nor does it interfere with any person's religious practices. In the absence of a definitive statement by the state court as to

[2] See complete discussion of the source of this phrase in *Reynolds* v. *United States*, 98 U.S. 145, 162-164.

[3] See *Doremus* v. *Board*, 342 U.S. 429.

the meaning or federal constitutionality of the state statute, this Court would be bound to pass upon these questions if [fol. 205] properly presented. *Doud* v. *Hodge*, 350 U.S. 485. The converse is also true. It is for the highest court of the state to tell us the meaning and application of a state statute. *Minnesota* v. *Probate Court*, 309 U.S. 270, 273; *United States* v. *Burnison*, 339 U.S. 87, 89; *In re Murchison*, 349 U.S. 133, 135. This Court must give weight to the expression of the state court. In the instant case there have been many expressions of the meaning of the state statute by the Supreme Judicial Court. These expressions have also made clear the federal constitutionality of the state statute.

It is clear that the statute before the court had some religious intent in its initial form. The preambles to the early enactments make this fact obvious. In the majority opinion much is made of this circumstance. For my part the fact that a statute has religious roots is not disturbing at all. Many of our laws have religious roots which lie deep in the religious background and traditions of the American people.[1] Frankly, I can think of no better roots that a law might have. The statute, however, providing as it does for a day of rest and cessation from business activities is clearly within the police power of the state and no apologies need be made for its history and origin.

The Supreme Judicial Court of Massachusetts had occasion to pass upon the question now before this Court in 1876, long before the inclusion of the First Amendment in the Fourteenth and long before the development of the line of cases exemplified by *McCollum* and *Everson*. In [fol. 206] these circumstances it cannot be said that the Supreme Judicial Court was writing its way around constitutional prohibitions or that the police power theory is recent contrivance.

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[1] By Executive Order and Presidential Proclamation, Christmas is designated each year as a holiday. This day, commemorating as it does the birth of Christ, is celebrated as a day of rest and cessation from business. No day could have deeper or more significant religious roots, yet if the reasoning of the majority is carried to its logical conclusion, such Presidential Proclamation contravenes the Constitution in its application to all persons, including non-Christian inhabitants of the United States.

The legislative intent in this statute was stated in *Commonwealth* v. *Has*, 122 Mass. 40, 42, as follows: "This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusement of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community."

[fol. 207] In *Commonwealth* v. *White*, 190 Mass. 584, the Supreme Judicial Court referred to the preambles to the early enactments of the statute which are sound in the day of rest purpose and in the religious observation purpose. This case does not hold that the statute is religious in purpose and intent. There the Court was concerned with what is "work of necessity" and determined that commercial cranberry picking was not a work of necessity within the meaning of the statute. The issue of religious freedom was not before the Court.

The language quoted above from *Commonwealth* v. *Has* has been recently affirmed in *Commonwealth* v. *Chernock*, 336 Mass. 384.

A thorough study of the Constitution of the Commonwealth of Massachusetts and the construction placed upon it by its highest court furnishes convincing proof that this state is second to none in the safeguarding and preservation of the rights and privileges of all of its inhabitants. The Constitution of Massachusetts in Part I, Article II, guarantees to all the freedom of religion. Part I, Article III, provides among other things that "all religious sects and denominations . . . shall be equally under the protection of the law, and no subordination of any one sect or denomination to another shall ever be established by law." (Inserted in 1833 by the Eleventh Article of Amendment.)

Article XVIII of the Articles of Amendment, after reasserting the freedom of religion, prohibits the use of any public funds for "any church, religious denomination or society." (Inserted in 1917 by the Forty-Sixth Article of Amendment.)

These provisions of the Constitution of Massachusetts [fol. 208] and many decisions of the Supreme Judicial Court indicate the scrupulous concern that the Commonwealth has for the rights, privileges and immunities of its inhabitants. In Volume 6 of the Opinions of the Attorney General, (1922) at page 483, is to be found the statement that the Constitution of Massachusetts "guarantees life, liberty and property, and equal protection to the same extent as does the Fourteenth Amendment."

It should not be inferred, however, that the Constitution of Massachusetts reflects any indifference towards religion and religious values. In its Preamble there is an acknowledgment by its framers of the "goodness of the great Legislator of the Universe", and a prayer for "His direction" in the establishment of the Constitution. Part I, Article II, declares that "it is the right as well as the duty of all men in society publicly and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the Universe." Part I, Article III, contains the following language " . . . the public worship of God and instructions in piety, religion and morality promote the happiness and prosperity of a people and the security of a republican government." In *Opinion of the Justices*, 214 Mass. 599, the Supreme Judicial Court said at page 601: "The Con-

stitution of Massachusetts in several clauses inculcates the practice of religion and urges the public worship of God as essential means for the perpetuation of republican institutions. But in emphatic and unmistakable terms it guarantees to all our people absolute freedom as to religious belief and liberty, unrestrained as to religious practices, subject only to the conditions that the public peace must not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated." That these guarantees exist for all, whether Chris- [fol. 209] tian or non-Christian, is settled beyond doubt by the decision of *Glaser* v. *Congregation Kehillath Israel*, 263 Mass. 435. In that case, at page 437, it was said: "These great guarantees of religious liberty and equality before the law of all religions are not confined to adherents of the Christian religion or to societies and corporations organized for the promotion of Christianity. They extend likewise to the adherents of the ancient religion whose sacred scriptures form a part of the Bible. We are of the opinion that Jews as well as Christians are protected by these explicit declarations of religious equality."

I have deemed it necessary to cite these provisions of the fundamental laws of Massachusetts and these few excerpts from the opinion of its highest court in view of the reference by the majority of this court to the decision of the *Commonwealth* v. *Has* as being an "ad hoc improvisation" and to other similar references to the interpretation placed by the Supreme Judicial Court upon the laws of the Commonwealth. The majority of this court has seen fit to label the Supreme Court's construction of the statute in the Has case as a "characterization" rather than as a construction of the law of Massachusetts.

I see nothing in the Constitution of Massachusetts, the decisions of its highest court, or the law now under attack, that warrants this court to challenge either the spirit of the law or the motives of that court. I perceive no occasion here to go behind the construction of the law of a sovereign state, placed upon it by its own highest court, which would appear to me to be in a better position to interpret its own law than this court. If there be occasions for a federal

court to question the motives of the highest court of a [fol. 210] state in construing its own statutory law, this is not one of them.

The Supreme Court of the United States has had two occasions to pass upon and to uphold statutes against claims that they violated the establishment of religion clause of the First Amendment or the clause banning any statute which prohibited the free exercise of religion contained in the same amendment. These cases are illustrative of many similar decisions by the Supreme Court of the United States. I select them because of the applicability of their language and because I think that they should be contrasted with the authority of the majority.

In *Reynolds* v. *United States*, 98 U.S. 145, the Court was faced with a defense to the charge of polygamy based upon the religious beliefs of the defendant. At pages 162-167 the Court said: " . . . (T)he question is raised whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

"Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

"The word 'religion' is not defined in the Constitution. . . . [fol. 211] The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

. . .

" . . . Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

. . .

". . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

. . . .

"So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

In *Zorah* v. *Clauson*, 343 U.S. 306, the Court was faced with a refinement of the "released time" program of McCollum in the sense that there was no expenditure of public funds to house the religious training classes or to oversee the children en route to the classes. In a six to three split the Court upheld the statute over objections that the statute violated the first and second clauses of the First Amendment. It was held that the state may cooperate with and recognize the existence of organized religion. At page 313 [fol. 212] it was said: "We are a religious people whose institutions presuppose a Supreme Being."

In differing conditions the Supreme Court of the United States has passed upon statutes requiring the cessation of either all or some business on Sunday. In 1885, in *Soon Hing* v. *Crowley*, 113 U.S. 703, the Court said, at page 710, "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observance, but from the right to protect all persons from the physical and moral debasement which comes from uninterrupted labors. Such laws have always been deemed beneficial and merciful laws especially to the poor and dependent, to the laborers in their factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States." In *Hennington* v. *Georgia*, 163 U.S. 299, in 1896, the Supreme Court set out the rule and the answer at pages 303-304, "The well settled rule is that if a statute purporting to have been enacted to protect the public health,

the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. . . . It (the statute) is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the [fol. 213] wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor."

The 1950 case of *People* v. *Friedman*, 302 N.Y. 75, upheld a similar statute against the same objections of interference with religious freedom. The Court of Appeals for the State of New York recognized that the Sunday laws were religious in origin but were maintained by the legislature for public health and safety purposes. On appeal to the Supreme Court of the United States a motion to dismiss was granted on the basis that no substantial federal question was presented. *Friedman et al.* v. *New York*, 341 U.S. 907.

With regard to the comment in the foot note on *Friedman* v. *United States*, 341 U.S. 907, *People* v. *Friedman*, 302 N.Y. 77-78, the following is pertinent:

The foot note asserts that the "New York statute has few characteristics or roots in history tending to indicate that it is a religious regulation". The fact is that *People* v. *Friedman*, at 96 N.E. 2d 186, asserts "that the so-called Sunday laws may be said to have a religious origin". The case goes on to say that even if the Sunday law to-day (i.e. in 1950) is penal in nature, Sunday is now set aside as a day of rest as wise and necessary to set apart for both the physical and moral welfare of a state or community.

With reference to this foot note, attention should be drawn to the preliminary report of the joint legislative

committee on Sabbath Law, State of New York, Legislative Document (1952), No. 50, published by Williams Press, Inc., Albany, New York, in 1952. This legislative document (at page 11) gives the chronology of New York laws both colonial and state. The first Sunday law from a New York [fol. 214] colony was enacted in 1664 and was known as the "Duke of York's Laws". In 1685, the General Assembly passed the first New York Colonial statute on the subject—a bill against Sabbath breaking. Generally this Colonial statute forbade wordly labor, business, or work of ordinary callings, prohibited traveling and sports and any exercises except works of necessity or charity. In 1695 the Colonial Assembly enacted another act against profanation of the Lord's Day, prohibiting traveling, servile labor, and working, etc.

In 1778 an act for suppressing immorality was first passed in New York as a state. This act repeated almost verbatim the prohibitions of the 1695 law. During the next hundred years there are only a few minor changes.

Finally, in 1881 the Penal Code was adopted and the prohibitions against work, labor, business, and sports were arranged in separate sections. Aside from the section on public traffic on Sunday, and the section on public sports on Sunday, there were very few amendments to the Sabbath article from 1881 to 1952, a period of approximately seventy years.

Section 2140 of the New York Penal Code, entitled "The Sabbath", sounds the key note of the Sabbath article in the following language: "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community".

How then, can the foot note state that the New York statute has few characteristics or roots in history tending to indicate that it is a religious regulation, when the legislature of the State of New York specifically designated it as regulating a religious day for a period of over approxi- [fol. 215] mately 170 years, and when the statute had colonial roots extending back for a further period of 114 years?

As to the statement that the Massachusetts statute is dominated by "prolix and irrational exceptions", with the intimation that the New York statute was not so characterized, it might be pertinent to point out that the Legislative Document No. 50 (1950) above referred to has as its "Preamble" the following statement from the annual message to the Legislature by Governor Thomas E. Dewey under date of January 9, 1952:

> "The Penal Law provisions on Sabbath observations date back many years. The original broad provisions have been whittled away through the years by numerous exceptions and the present provisions create an illogical and inconsistent pattern. Although it is legal to conduct professional baseball, football, and soccer games on Sunday in many communities, it is illegal to conduct other sporting events and activities similar to those which are permitted. There are many other incongruities and examples of disparate treatment. Many activities which do not interfere with the religious repose of the community are prohibited by existing law. There is need for a careful re-examination of these provisions. I recommend that your honorable bodies establish a joint legislative committee to study the problems".

It is significant that the Governor of the State of New York clearly recognized that Sabbath Day regulations was a matter for the Legislature, and he merely indicated that the law could be modernized to permit "activities which do not interfere with the religious repose of the community." To the intimation of the foot note on the Friedman case that the New York statute has few roots in history tending to indicate that it is a religious regulation, the true characteristics and roots of the statute may be found in expressions indicating a religious connotation from colonial laws in 1664 to the recommendation of the Governor of the State in 1952.

This brings us to the second issue, that of equal protection. With the religious issue disposed of, the possibility of violation of equal protection arises from the exceptions

to the statute. So long as the exceptions are not unreason-
[fol. 216] able on their face we have no power to pass upon them. *Smith* v. *Cahoon*, 283 U.S. 553, 566-567, "The principle that the State has broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this Court (citing cases). But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action."

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

"2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

"3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.

The Supreme Judicial Court of Massachusetts has adopted similar standards for determining the constitutionality of a legislative enactment and has used language
[fol. 217] particularly applicable here.

"The plaintiff contends that the statute imposes an arbitrary and unreasonable restriction upon its right to conduct its business, and deprives it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and of Articles 1 and 10 of the Declaration of Rights of the Constitution of

Massachusetts and by the Fourteenth Amendment to the Constitution of the United States. And the right to engage in such a business or occupation carries with it the making of contracts, the advertising of goods, the solicitation of customers, and the adoption of the various means that are usually employed to encourage trade and to extend the market for goods. *Holcombe* v. *Creamer*, 231 Mass. 99, 108, 109. *Opinion of the Justices*, 271 Mass. 598, 601. *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105, 113. *New States Ice Co.* v. *Liebmann*, 285 U.S. 262, 278. But one cannot conduct his business or pursue his occupation in any way he may desire. He is subject to reasonable regulations designed to protect the public interest. A reasonable regulation governing the sales of property does not deprive the owner of his property without due process of law. *Commonwealth* v. *Crane*, 162 Mass. 506. *Commonwealth* v. *Libbey*, 216 Mass. 356. *Nebbia* v. *New York*, 291 U.S. 502. *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176.

. . .

". . . The legislature possesses a large measure of discretion to determine what the public interest require and what means should be taken to protect those interests. The field for the legitimate exercise of the police power is coextensive with the changing needs of society. The record does not negative the existence of any of the possible findings [fol. 218] that have been mentioned. All rational presumptions are in favor of the validity of an act of the legislative department of the government. *Perkins* v. *Westwood*, 226 Mass. 268. *Moore* v. *Election Commissioners of Cambridge*, 309 Mass. 303. *Morrissey* v. *State Ballot Law Commission*, 312 Mass. 121, 130.

. . .

"One assailing a statute on constitutional grounds has the burden of proving the absence of any conceivable grounds upon which the statute may be supported. 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.' *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251,

257-258. 'The burden is not sustained by making allegations which are merely the general conclusions of law or fact. . . . Facts relied upon to rebut the presumption of constitutionality must be specifically set forth.' *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185.

. . . .

"The contention of the plaintiff that the statute imposes an arbitrary and unreasonable restriction upon its business cannot be sustained." *Merit Oil Co.* v. *Director, Necessaries of Life*, 319 Mass. 301, 302-306.

Testing the statute before the Court by each of the tests set out I believe that the answer must be in favor of the validity of the statute. Essentially the test is whether or not the exceptions are reasonable or are so arbitrary that this Court would be warranted in invading the province of the General Court of Massachusetts. Each of these exceptions was engrafted upon the statute at a different time and each was engrafted by vote of the legislature of Massa- [fol. 219] chusetts. Careful analysis of the exceptions warrants the conclusion that each exception either allows the operation of a business which the General Court has determined is necessary or serves as an aid to the achievement of the rest and relaxation for which the legislature has set aside the day.

The late Chief Justice of the Supreme Court of the State of New Jersey, in an opinion upholding the state statute which banned the sale of automobiles on Sunday, said, "The State has an absolute right to enter here and force on all and everyone so engaged regulations for the benefit of the public, and it is not for the Court to say that its action in doing so is contrary to the constitutional provisions against discrimination merely because there are classes similarly situated with respect to the public or social evils requiring similar legislation that are yet unregulated . . . " *Gundaker Central Motors* v. *Gassert*, 23 N.J. 71, 127 A. 2d 566. An appeal to the Supreme Court of the United States was dismissed for failure to present a substantial federal question. 354 U.S. 933.

I would ordinarily say nothing further but I believe that the opinion of the majority demands some comment by me. The factual statements of the majority opinion contain

some unwarranted assumptions. They state that business considerations make operation of the corporate plaintiff's store on Saturday night impracticable. If the store closed at 10 p.m. on Saturday night an average of four hours business could be conducted for most months of the year. It should be borne in mind that it is alleged that the customers of the corporate plaintiff's store are not casual passers-by nor persons who treat it as a convenient corner grocery. It is the basis of the complaint that the customers inconvenience themselves to shop at the store. The cor- [fol. 220] porate plaintiff would pay no more to have its employees work on Saturday night and Sunday morning than it already pays them to work all day Sunday. I do not agree that Saturday night and Sunday morning operation within the statute would be impracticable.

The majority of the Court also state that it is common knowledge that a grocery store's business is concentrated on Friday evening and Saturday. This contradicts the equally common knowledge that super-marketeering has changed the buying habits of the consumer and has tended to level out the volume of business of grocery stores. Based on a mis-assumption as to the buying habits of the consuming public the majority of the Court attribute the Sunday volume of the corporate plaintiff's store to the buying habits of Orthodox and Conservative Jews. This volume might as well be attributed to the fact that the corporate plaintiff's store is the only super market open on Sunday in the area. (Transcript p. 120). Further, the manager of the corporate plaintiff's store testified at hearing that Sunday business is not exclusively with Orthodox and Conservative Jews and that the store does not refuse to sell on Sunday to Gentiles. He said, "We don't discriminate. It would be bad business not to (sell to whoever came into the store)". It should also be added that examination of the day book of the corporate plaintiff, which was introduced in evidence, indicates that the corporate plaintiff's store, on Labor Day, did a volume of business which was greatly disproportionate to the business done on Mondays which were not holidays. This on a day after a Sunday on which they did their usual heavy business. The conclusion which I draw from this fact is that the

store's Orthodox and Conservative customers either bought almost twice as much in this week as in other weeks or that the store was taking advantage of the fact that it was the only super market open on the holiday. The latter appeals [fol. 221] more to reason than the former.[5]

It is stated in the majority opinion that "if the challenged law is constitutional the Crown Market can be open only five days". This statement is correct when the distinction is added that the corporate plaintiff may not lawfully do business on Sunday, except during the hours established by the legislature, according to the secular law of the state, and that the corporate plaintiff may not do business lawfully between sundown on Friday and sundown on Saturday according to the law of Orthodox Judaism, which law is not part of the jurisprudence controlling this Court. The point I wish to make is that under the law with which we must concern ourselves, if the statute is constitutional, the corporate plaintiff is lawfully prohibited from doing business on only one day of the week.

If the bald statement quoted above is correct what is to prevent an unscrupulous business man from forming or joining a religious body which observes as its Sabbath the day of the week on which his business is slowest? If, in the view of the majority, he closes his place of business on his Sabbath, then he has the constitutionally protected right to open his business, whatever it may be and wherever it may be located, on Sunday and do business with any and all customers. I do not think that this argument need be further expanded in order to demonstrate the logical fallacy inherent in the position taken by the majority.

The majority accuse the Supreme Judicial Court of Massachusetts of intellectual dishonestly in writing the *Has* case when they say that the decision was an "ad hoc im-[fol. 222] provisation", yet the majority blissfully ignore the very real distinction between the *Has* case and *Common-*

[5] The corporate plaintiff offered in evidence a record of its sales (Ex. 1). It is interesting to note that on Sunday, June 30, 1957, its gross sales were $3,583.61; on Wednesday, July 3, of the same year—$2,883.30, and on the following day, July 4, 1957,—$5,492.68. The religious convictions of some of the plaintiff's customers cannot explain this statistical data.

wealth v. *White*, supra. However, the majority choose to describe the language of the *Has* case quoted above as "characterization" rather than as "construction" so that they could bring it under the rule of *Society for Savings* v. *Bowers*, 349 U.S. 143, 151, rather than the line of cases represented by *Minnesota* v. *Probate Court*, supra, *United States* v. *Burnison*, supra, and *In re Murchison*, supra, all of which hold that a construction as to the meaning of a state statute by the highest court of a state is binding upon the Federal Court.

The majority of the court in its opinion is highly critical of the exceptions in Section 6 of Chapter 136 of the General Laws of Massachusetts, to the blanket prohibition of Section 5 and refers to some of them either facetiously or as being the likely result of action by "pressure groups". I find nothing either in the record or in the law that warrants any such conclusions to be drawn. If there be anything in the legislative history of these exceptions which were enacted into law at various sessions of the Legislature and over a period of years that warrants such conclusions, it is unknown to me.[6] The granting of these exceptions by the

[6] In the majority opinion it is stated that "the statute does not generically forbid the keeping open of a store on Sunday to sell food, but it just limits this liberty to selected types of stores. Employees of the favored stores are not less in need of rest than those of the Crown Market" etc. In a footnote relating to the subject matter the court has listed many of the exceptions which it characterizes as "whimsical", "prolix" and "irrational". In my judgment there is no warrant or justification for the phrase "favored stores" or for the harsh adjectives employed. What the Legislature has done is to give recognition to the nature of the day as a day of rest, leisure and relaxation by permitting the sale of some foods and beverages which are believed to be necessary or to contribute to the refreshment of that day. No markets are permitted to be open at any hours on Sunday except markets for the sale of Kosher meat and milk which may remain open until 10:00 A.M. All other markets are closed including the super markets and large general stores. The classification established by the Legislature quite obviously refers solely to the types of stores and the products they sell, and in no way to the race or religion of the proprietor or the employees.

In the absence of a legislative history of each enactment creating the various exceptions that appear in Section 6 of Chapter 136 of the General Laws, the mere listing of the exceptions is wholly

Legislature appear to me to be matters of public policy peculiarly within the competence of the Massachusetts Legislature and well beyond the competence of this court. If I were to draw any conclusions from a study of these exceptions, I would say that they were undoubtedly granted for the purpose of accommodating the law to the needs of a developing society and that they were made for the purpose of contributing towards the refreshment of the people's participation in their day of rest. Some, perhaps, have been determined to be works of necessity under the present conditions of society. However, that may be, they are legislative matters and matters of public policy affecting the people of Massachusetts and are not in any sense

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without meaning. Those relating to sports will be found to be much the same as the laws of other states regulating the conduct of amateur and professional sports on Sundays. The provisions of the law which permits the digging of clams on Sunday but not the dredging for oysters is characterized in a footnote to the majority opinion as being "whimsical". The fact is—and this is certainly common knowledge to the people of Massachusetts—that for generations, people residing along the seashore of the state have been digging clams for sport and for their own consumption when the tide is at a low ebb; whereas the dredging for oysters is a commercial enterprise involving the cultivation of oyster-beds, skillful dredging and other specialized activity. The distinction is not at all whimsical although it might appear to be so to the casual critic.

Further, the same footnote in the majority opinion states "Newsdealers whose stores are open every other day of the week (thus excluding Sabbath-observing Jews) may sell milk and tobacco at all times on Sunday". No such unreasonable interpretation has ever been placed on this section of the statute by any court. The statute obviously refers to regular newsdealers whose places of business are permitted by law to be open throughout the week and it certainly does not mean that if an individual newsdealer sees fit to close his doors on any particular day, he is thereby prohibited from opening on Sundays. Such an interpretation is lacking in logic and plain common sense. To suggest that Jewish newsdealers are prohibited from making the same sa[illegible] on Sunday as their Christian competitors is not a correct statement.

The other exceptions in the statute could be similarly reconciled, but the foregoing will suffice to illustrate that the people of Massachusetts and their legislators have not busied themselves throughout the years with enacting laws that are whimsical, prolix or irrational. Least of all are the exceptions discriminatory.

matters for this court to discuss and debate. In my view, [fol. 224] it constitutes an unwarranted intrusion for a Federal Court to substitute its judgment on such matters for the judgment of the members of the Legislature who are elected by, and are directly responsible to the people of the Commonwealth of Massachusetts.

The history of the Lord's Day statute, which has been referred to as one of the "blue laws" of this Commonwealth by my colleagues, is one which dates back to the union of the states and is a part of the Golden Treasury of the kind of a civilization which every good citizen must try to perpetuate. It is not only a day of rest, but, quoting from the decision of *Commonwealth* v. *McCarthy*, 244 Mass. 484 at page 486:

> "... that the day could not be merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and response undisturbed by secular cares or amusements. Whatever inconvenience might result at the present day from the literal and general enforcement of the Lord's Day Act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute."

The courts of the United States, the courts of the States, and those who help to frame our laws and who help to chart our way of life must make certain that the line is held within the law against any person who would make the law nothing more than an instrument for destroying religion in the name of democracy. I believe that this should be the credo of all people regardless of their religious beliefs.

It must never be forgotten that ours is a government of laws predicated upon majority rule, and it must be remembered that when this day was set the States of the Union had each reserved to itself the right to enact statutes within the boundary lines of its constitution for the comfort, safety, and convenience of its people and the spirit of rest, comfort, and quietness of a Sunday in the lives of the [fol. 225] people of Massachusetts, with the importance of

having in mind other economic factors, and with the recognition of the value of the obligations and responsibilities of parents and the happy relationship of members of families associated with this day which not only has the aspects of rest, recreation and association, but also spiritual reflection. We cannot become prisoners of a false philosophy, which is truly dialectical materialism, and which in plain language represents the philosophy of Marx, Engel and Lenin, neither can we deny the right of others to disagree with our point of view. But is the person promoting this suit actuated by the spirit of the early founders of this great country, is he safeguarding the rights and privileges of our American society or is he using this as a medium by which to destroy these spiritual and economic values, the inevitable result of which might well be the complete destruction of our way of life? And if this were to happen, of what value would be our Constitution and laws, and our democratic way of life?

It is difficult to escape the conclusion that this is an example of an attempt to strike down the Constitution of Massachusetts and the Lord's Day as violative of rights under the First and Fourteenth Amendments of the United States Constitution on the basis of alleged religious belief, so that articles of every nature and description, kosher or non-kosher, could be sold. Examination of some of the documents attached to the appendix, which represent a part of the opinion filed in the Clerk's Office, clearly shows this.

Examination of the docket discloses that the appearance of the late Attorney General of the Commonwealth of Massachusetts was filed on July 23, 1958. While three amendments to the complaint which were filed during the summer of 1958 were assented to by attorneys for the Chief of Police of Springfield, they did not contain the name of the Attorney General although counsel for the plaintiff well knew notice had been given to the Attorney General under the statute. After the successor to the Attorney General had qualified the case was marked for hearing on October 30, several days before that the successor to the Attorney General requested a delay so that he might prepare and participate. At the hearing on November 3 the brief of the Commonwealth and a stipulation of fact were filed. The stipulation of fact does not agree with the evidence presented. No evidence was offered by the Attorney General's representative, who was the only active counsel for the side adverse to the petitioner.

[fol. 226] I am directing the Clerk of the Court to file as an appendix to the original copy of the opinion, which will be a matter of public record, copies of the following documents: Certified copies of Complaints against Harold Chernock doing business under the name and style of the "Crown Kosher Market, Inc.", the Defendant's Bill of Exceptions in the same case, which was filed on September 6, 1956, together with a brief filed by the Commonwealth of Massachusetts with the signature of the then District Attorney of the County of Hampden Stephen A. Moynahan; the brief of the defendant Chernock so called, doing business under the name and style of the "Crown Kosher Market, Inc.", and an exemplified copy of a Bill in Equity with the request for a temporary restraining order filed in the Superior Court of the County of Hampden, with the caption for the plaintiff "Crown Kosher Super Market of Mass., Inc., alias Harold Chernock d/b/a Crown Market", with the attorney for the petitioner in part the same as the one entered for the petitioner in the three judge court case; and a copy of the Certificate of Incorporation of the Crown Kosher Super Market of Massachusetts attested to by the Secretary of the Commonwealth. It may be said parenthetically also that while there was an interlocutory decree for a temporary restraining order granted, this was obtained through no hearing but upon consent of counsel of record in this particular case.

The so-called cash book offered by the complainant's counsel, available for examination and marked as an exhibit, is a very small ledger book which contains figures running only from June, 1957, down to November, 1958. I am co-relating this with the footnote #5 on page 24, which discloses the fact that this store was open on every day in the year (with the exception of Saturdays, and other Jewish Holidays and Thanksgiving Day), including [fol. 227] Labor Day of 1957 and 1958, and that on all these days where business had been suspended by others, very substantial amounts running into four figures were taken in.[8]

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[8] July 4, 1957 $5,492.68; September 1, Sunday, $4.179.58; September 2, Labor Day, $2,536.45; Christmas Day, $1,885.86; January 1, 1958, Wednesday, $2,233.66; July 4, 1958, $5,816.98; August 31, Sunday, $3,670.05; Monday, Labor Day, $2,173.52.

These facts speak for themselves, but a fair inference from all these entries discloses the fact that the business of this Crown Kosher Meat, Inc., alias Chernock, amounted to at least $600,000, and that about 40% of this business occurred on Sunday and on Mondays, particularly when a holiday was celebrated. They show figures of a very substantial nature on the 4th of July of 1957 and 1958. This is evidence of the commercial point of view in contradistinction to the spiritual and patriotic background of a day dedicated to the courage and Americanism of our Founding Fathers, when there was truly a great heritage passed down to the people of the United States by a proclamation on that same day that a new nation was born in keeping with the written Declaration of Independence, and the Crown Kosher Meat Market so-called remained open.

In closing I feel constrained to say that the law sought to be invalidated here has been on the statute books of the Commonwealth of Massachusetts in substantially its present form since Massachusetts joined the Union. Until very recently there was scarcely a voice raised against what has become a traditional part of our way of life. Those who framed the Constitution of Massachusetts, and indeed those who framed the Constitution of the United States, saw nothing incompatible in the observation of the Lord's Day as a day of rest, and there is nothing in the Constitution of either the United States or Massachusetts that admits of any such strained interpretation as is sought here to [fol. 228] the First and Fourteenth Amendments. The opinion of the majority of the court, if allowed to stand, will advance the cause of religious freedom and liberty not one iota. Its inevitable effect will be to disunite and divide the people of this Commonwealth, to dislocate our economic set-up, and to lay the foundation for the growth and development of cancer "isms", having in mind the economic values that are co-related with other statutes of the Commonwealth regulating hours of work and hours of labor and the rights and privileges of owners of many places of business engaged in many specialties, who do not seek to carry on their business activities on the Lord's Day. The law should be upheld.

I feel that I have discussed this matter sufficiently in the opinion, but I am disposed to re-emphasize the fact that ours is a government by the majority and that this majority should not be unreasonably unfair with the rights of the minorities who sincerely observe their religious beliefs. The good Jewish people, particularly those who are Orthodox Jews, faithfully observe Saturday as their Sabbath, which serves as a day of comfort and rest for them, and they representing the working class, as well as the Christians, because of the forty hour week law enjoy this Saturday and abstain from work the same day.

They are permitted under the present Lord's Day statute to purchase Kosher meats on Sunday. In all other respects the food they partake of outside of special holy days in the liturgy of Orthodoxy is the same as that used by Christians, but we cannot forget that if there is any interference with their religious observances these questions should be settled by the General Court of Massachusetts, which is in a position to recognize these minority rights which after [fol. 229] all are but a small percentage of the population. In this particular matter before the Court these petitioners have been engaged in business since 1934, and an examination of their charter rights clearly indicates that they have the power to open warehouses on Sunday. It is clear that the Jewish people who passed down through the corridors of centuries the precious spiritual values which have served as a foundation stone of respect for God would not for one minute support any movement where under the cloak of religion a one-man corporation was using a spiritual garment as a medium by which unjustly to enrich himself.

I would dismiss the complaint, or refuse the injunction, and declare the statute constitutional in the circumstances.

I am respectfully reserving the right to file an additional memorandum if I find it necessary to discuss other matters which are a part of the history of this case.

[fol. 230] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,
Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and President of the Massachusetts Council of Rabbis, suing on behalf of himself and other Rabbis similarly situated, Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, Defendant.

FINAL DECREE—June 12, 1959

Whereas the above-entitled cause came on to be heard on the 13th day of November, 1958, and all parties thereto appeared by counsel;

And Whereas the Court heard the pleadings, the evidence, and arguments by counsel for the parties and the Commonwealth of Massachusetts, and briefs on behalf of amici curiae, and upon due consideration thereof held in an opinion, findings of fact and conclusions of law filed on the 20th day of May, 1959, that the plaintiffs should be granted relief;

And Whereas it was ordered that the form of decree be settled upon notice, and the plaintiffs having submitted and served a proposed form of decree, and no counter-form

of decree having been filed, and objections to the proposed form having been considered, it is therefore, on this 12th day of June, 1959,

Ordered, Adjudged and Decreed:

(1) That Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, is unconstitutional, void and unenforceable as applied to the plaintiffs in this [fol. 231] action, in so far as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday;

(2) That the defendant, his agents, servants, and employees, and all others acting in his behalf, be, and they hereby are, enjoined and restrained from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce Section 5 of said Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, against the plaintiffs in this action; and

It is further Ordered, Adjudged and Decreed that the plaintiffs recover the costs of these proceedings, to be taxed by the Clerk of this Court.

Calvert Magruder, Peter Woodbury.

June 12, 1959

[fol. 232] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

MOTION FOR NEW TRIAL—Filed June 22, 1959

Now comes Edward J. McCormack, Jr., Attorney General for the Commonwealth of Massachusetts and moves that a new trial be granted in the above entitled matter for the following reasons:

1. The evidence submitted is insufficient as a matter of law to sustain findings of fact.

2. The findings of fact made by the Court are inconsistent with such evidence as was submitted.

3. The opinion of the majority of the Court is predicated on its finding that "most of the facts were stipulated by the parties" whereas the stipulation actually was limited to the tenets of the orthodox Jewish faith and did not relate to particular facts affecting the petitioners.

[fol. 233] 4. The opinion states that four officers and stockholders and six directors of the corporate plaintiffs are all adherents of the orthodox Jewish faith. No evidence was offered to support this conclusion.

5. The opinion states that a very substantial percentage of the corporate plaintiff's customers are orthodox Jews. No evidence was offered to substantiate this fact.

6. The opinion states that a large majority of Crown Market's customers may not shop on the Sabbath. No evidence was submitted to support this conclusion.

7. The opinion states that an inspector for the Rabbi comes to the Crown Market at 8:00 a.m., on Sundays for the washing of meat. The evidence clearly shows that the meat was not washed on Sunday.

8. The opinion states that the plaintiff Rabbi adequately represents a class of persons affected by the statute in question. No evidence was submitted to support this conclusion.

9. The opinion states that plaintiff customers and plaintiff rabbis cannot, by any act of shopping at the corporate plaintiff's store or by inspecting it, violate the Sunday law. This statement is not supported by the law of the Commonwealth of Massachusetts. Assuming it were correct, the plaintiffs would have no standing to object to the statute if they could not show that their rights were injured by it.

10. The majority opinion interpreted the Massachusetts Statute in a manner contrary to the interpretation placed upon it by State Courts and have thereby rendered an invalid judgment.

11. The majority opinion on its face states that G.L. c. 136, § 5 violates the Federal Constitution because it was a statute affecting the establishment of a religion whereas [fol. 234] the Decree entered by the Court is inconsistent therewith by providing that the statute is unconstitutional only as applied to the petitioners in this case.

12. The Decree entered by the Court in this case has the effect of preferring members of the orthodox Jewish faith to members of any other religious sect.

13. Additional evidence is available as indicated by the minority opinion to establish that the corporate plaintiff in the present proceeding was actually a party in State proceedings and therefore is estopped to obtain the relief requested in the present proceeding.

14. The Final Decree purports to restrain only a local police chief and does not extend to a State official. As such, the Decree is invalid because it has not been joined in by the one District Court Judge sitting in the case.

15. In addition to the foregoing, the Attorney General seeks a new trial for purposes of clarifying and elucidating further the conflicting factual situation described in the minority opinion.

Respectfully submitted,

Edward J. McCormack, Jr., Attorney General, By
Joseph H. Elcock, Jr., Assistant Attorney General.

Proof of Service (omitted in printing).

[fol. 235]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471 M

CROWN KOSHER SUPER MARKET OF MASS., INC., and IRVING HEAFITZ et al.

v.

GALLAGHER

OPINION OF THE COURT—July 20, 1959

On Petition for Rehearing

Per Curiam. We have before us a paper wherein the Attorney General for the Commonwealth of Massachusetts comes "and moves that a new trial be granted in the above entitled matter". This may seem somewhat curious because, although an appearance was filed on behalf of the Governor and the Attorney General, the Attorney General has not appeared for the sole defendant, nor does he purport to act for him. We must assume, however, that in effect the Commonwealth intervened as a party defendant pursuant to its undoubted right to do so under 28 U.S.C. § 2284(2), and that the failure to file a formal petition for intervention was just an administrative omission. Thus we take it in the present movant's favor that he has standing to seek a new trial.

Ground 1 of the motion for a new trial is that: "The evidence submitted is insufficient as a matter of law to sustain findings of fact." Ground 2 reads: "The findings of fact made by the Court are inconsistent with such evidence as was submitted." These grounds are of course important if true. But it must be remembered that in an equity case the court is the trier of the facts. It is the court which must weigh the testimony and other evidence, observe the demeanor of the witnesses, and find the facts. It is abundantly clear that there is evidence to support the findings

of fact, and the majority of the court are content to abide by those findings on the evidence submitted.

Ground No. 3 complains of the court's finding that most of the facts were stipulated by the parties, whereas the stipulation actually was limited to the tenets of the Orthodox Jewish faith and did not relate to particular facts affecting the petitioners. This asserted ground for a new trial is patently absurd, in the face of an examination of the stipulations of fact signed by the movant's attorney, especially the supplementary stipulation.

Ground No. 7, in which it is stated that the "evidence clearly shows that the meat was not washed on Sunday", is based upon a clear misstatement of the court's finding that "The inspector comes . . . on Sunday for the washing of *any* meat from animals slaughtered on the previous Thursday *which is on hand*." [Italics added.] In any event, this is a tempest in a teapot concerning a very minor matter.

[fol. 236] The findings attacked by grounds numbered 4, 5, 6 and 8 are supported by substantial credible testimony, by the stipulations of fact, and by the exhibits, just as is the finding that 95 per cent of Crown Market's stock is kosher.

Ground No. 9 objects to the statement in the court's opinion that the plaintiff customers and plaintiff rabbis cannot, by any act of shopping at the corporate plaintiff's store or by inspecting it, violate the Sunday law. It was stipulated that the plaintiff customers were Orthodox Jews; the rabbis, needless to say, are orthodox. These persons are squarely exempted from the Sunday law by c. 136, § 6, even as construed in *Commonwealth* v. *Starr*, 144 Mass. 359 (1887).

Ground No. 10 objects that the judgment is invalid because the majority opinion interpreted the Massachusetts Sunday law in a manner contrary to the interpretation placed upon it by the state courts. The court was bound to accept as its premise the interpretations put upon the Sunday law by the Supreme Judicial Court, and it did so. In fact, at the oral argument before us we understood

movant to contend that all the plaintiffs were within the exception contained in § 6; but the court was obliged to accept the contrary holding of the *Starr* case, supra. The majority did reject, which it had the right to do, the characterization of the statute in *Commonwealth* v. *Has*, 122 Mass. 40 (1877), as being merely a police measure designed to preserve a day of rest. We rejected that characterization as sporadic in the state decisions and unsound on the face of the statute. It is also to be noted that the Supreme Judicial Court has never had occasion to pass on the federal constitutional questions presented in this case.

Ground No. 11 objects that there is some inconsistency between the court's decree, which holds the statute unconstitutional merely as applied to the petitioners in this case, and the court's opinion, which states that the statute violates the Federal Constitution because it was a statute respecting an establishment of religion. This objection is based upon a tortured reading of one phrase of the opinion torn out of context. It is apparent that the only question argued or considered was the alleged unconstitutionality of the statute as applied to these complaining persons.

It seems hardly necessary to answer the objection contained in ground 12 of the motion that the decree entered by this court "has the effect of preferring members of the orthodox Jewish faith to members of any other religious sect." This objection ignores, among other things, the fact that the court held that these plaintiffs were unconstitutionally discriminated against. We can only knock out that which we find to be unconstitutionally discriminatory; we cannot go further and legislate a wholly even balance between the competing interests.

[fol. 237] Ground No. 14 objects that the decree purports "to restrain only a local police chief and does not extend to a State official", whereas under 28 U.S.C. § 2281 the power of a three-judge court is limited to restraining the action "of any officer of such State in the enforcement or execution of such statute". This objection is insubstantial in view of the answer and stipulation, both of which conceded that the defendant police chief did and would enforce the state law. *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D.

Ala. 1956), aff'd 352 U.S. 903 (1956). Besides, this question is probably rendered moot by the Attorney General's intervention as a party defendant.

Grounds 13 and 15 may be discussed together. In ground 13 it is objected that "Additional evidence is available as indicated in the minority opinion to establish that the corporate plaintiff in the present proceeding was actually a party in State proceedings and therefore is estopped to obtain the relief requested in the present proceeding." More generally, in ground 15 "the Attorney General seeks a new trial for purposes of clarifying and elucidating further the conflicting factual situation described in the minority opinion."

The State's titling of an indictment brought against "Harold Chernock d/b/a Crown Market" cannot be laid at the door either of Chernock or of the corporation. Further, the plaintiff Crown Market is certainly a corporation, whereas, as the answer admits, the state prosecution and conviction were solely of the individual Chernock. See also *Browder* v. *Gayle*, supra. The auxiliary civil action in the state courts never reached the merits before its dismissal as moot. Moreover, grounds 13 and 15 are both insufficient in failing to indicate what clarifying evidence could be introduced at a new trial, unless the only evidence is that described in the dissenting opinion. Assuming that it is so, the movant has wholly failed to demonstrate either that the failure to introduce such evidence was excusable or, more important, that any new evidence is available which would affect the result.

It may be that the case might have been presented to us differently if another had been in charge of defending it. But we must act on the evidence presented to us in an adversary proceeding, not on matters dehors the record found in an ex parte investigation. *Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F. 2d 316 (C.A. 3d, 1944), cert. denied 325 U.S. 867 (1945).

McCarthy, J., dissents from the denial of the motion for a new trial, and reserves the right to file a memorandum at a later date.

An order will be entered denying the motion for a new trial.

[fol. 238]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

ORDER DENYING MOTION FOR NEW TRIAL—July 20, 1959

Upon consideration of the motion for new trial filed by the Attorney General of the Commonwealth of Massachusetts on June 22, 1959, plaintiffs' memorandum in opposition thereto, and the Attorney General's memorandum in support thereof, and in accordance with the opinion filed this day,

It is hereby ordered, adjudged and decreed that the motion be, and the same hereby is, denied.

By the Court:

Calvert Magruder, U.S.C.J. (Ret.)

John A. Canavan, Clerk, By Joseph [Illegible], Deputy Clerk.

[fol. 239]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC., et al.,
Corporate Plaintiff,

vs.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts.

MEMORANDUM ON ORDER DENYING MOTION FOR NEW TRIAL—July 23, 1959

McCarthy, D. J.

On July 20, 1959, an order was entered by Judge Magruder, concurred in by Judge Woodbury, denying the motion filed by the Attorney General of the Commonwealth of Massachusetts that a new trial be granted in the above-entitled matter. It is my considered judgment that the Attorney General of the Commonwealth of Massachusetts should have been accorded the opportunity to appear and argue orally the motion for a re-hearing filed by him in a case which indisputably contained so many complexing facts and circumstances. This procedure in the District Courts of the United States has always been recognized.

I disagree with the judicial determination of my distinguished colleagues both as to procedure and as to substance and I will file at a later date my memorandum fully expressing the reasons for my dissent.

[fol. 240]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC.,

v.

RAYMOND P. GALLAGHER, Chief of Police.

DISSENTING MEMORANDUM ON ORDER DENYING MOTION FOR NEW TRIAL—November 12, 1959

McCarthy, D. J.

In this Three-Judge Court case the Commonwealth of Massachusetts moved for re-hearing after the decision of the majority of the court had been handed down. The same majority in a "per curiam" decision have denied the motion without a hearing. As I indicated when the motion was

denied, I did not agree with the denial. Herein, I express my reasons briefly for that disagreement.

In my dissenting opinion I stated that "the interests of justice would best be served by reopening the case in this court for the purpose of taking testimony for the purpose of establishing the truth". A re-examination and re-appraisal of the case as it was presented to the court has served only to strengthen my conviction that this case should not go to the Supreme Court in its resent posture. The basic issues involved are of such importance that it would be extremely unfortunate, to say the least, to have the High Court presented with a record that is incomplete, inconclusive and confusing. A rehearing in my judgment would have resulted in the introduction of sufficient evidence to have clarified the factual situation.

In the memorandum of the majority of the court filed after the motion for rehearing was denied, it is stated [fol. 241] that "the result in this case might well have been different had the case been tried in another way". I would be less than candid if I did not make the observation that insofar as the presentation of evidence on behalf of the defendant was concerned, the case was not tried at all. One need only consult the record in the case and the docket entries on file to appreciate that this is so. The late Attorney General of the Commonwealth apparently contented himself with filing an appearance in its behalf. An Assistant Attorney General was assigned to the case but his activity was confined to the arguing of a motion to dismiss the complaint and to a cross-examination of the one witness who testified on behalf of the corporate plaintiff. In making that observation I make no reflection upon the able Assistant Attorney General who appeared in the court proceedings. Whatever the reasons may have been for the failure of the Commonwealth to investigate the allegations of the complaint, to present evidence on behalf of the defendant, and to uphold the constitutionality of the law of Massachusetts which had been repeatedly upheld by the State Supreme Court, the fact remains that the complete absence of credible evidence has left the record in this case inconclusive and confusing. I may say that the lack of preparation in this case was known to the majority of the court before the first hearing and, *a fortiori*, at the time that the motion

for re-hearing was decided adversely. Believing as I do that the sole aim and object of the trial of a law suit is to establish the truth, I deem it my duty to renew the protest hitherto made in my dissenting opinion against the manner in which this cause has been defended.

The basic issues involved are of such importance that it would be extremely unfortunate, to say the least, to have the Supreme Court presented with a record that is thoroughly incomplete, inconclusive, confusing, and lacking in probative value, exemplified by the many contradictory [fol. 242] statements by the one witness, Mr. Chernock. He was the chairman of the board of directors and owned fifty per cent of the stock of the company, of which his wife and a relative were also members and constituted three of the five directors. He was the general manager but could give no testimony with reference to the sale of the commodities outside of meat. Non-meat products represented at least eighty-five per cent of the many commodities which were not established as kosher food products. These other products were purchased by somebody else and Chernock admitted that he could not tell what they were—all this in a store called a kosher super market which employed as a maximum no more than eleven, and with a general average of six working. It is important to contrast the testimony with the agreed statement of facts which are already in evidence and upon which the same case under another name was passed upon favorably to the Commonwealth in the criminal proceedings by the Supreme Judicial Court.

I believe that a court should be extremely reluctant to strike down a state statute as unconstitutional where the state courts have upheld the statute on repeated occasions, especially where a court is presented with a record such as we are confronted with here. I would allow the motion for rehearing and grant the parties sufficient time to develop the evidence required to sustain or refute the allegations of the complaint.

I would respectfully suggest in the alternative that the proceedings be referred to a special master in order to have the true facts determined. Apart completely from the relative values of the various factual questions arising out of the testimony of the witness Chernock, which is a part

of the transcript of the hearing before the three-judge court on November 13, 1958, which transcript also contains arguments of counsel in connection with other matters which were argued before the court at that time, and which is a part of the court record to be sent to the Supreme Court of the United States on the appeal that has been taken, I [fol. 243] reaffirm my conclusions of law on every phase of the other issues before the three-judge court which I have set forth in my original dissenting opinion.

[fol. 244] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,
Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and President of the Massachusetts Council of Rabbis, suing on behalf of himself and other Rabbis similarly situated, Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, Defendant

---

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 18, 1959

Notice is hereby given that Raymond P. Gallagher, Chief of Police of the City of Springfield, Massachusetts, the defendant above named, together with Edward J. Mc

Cormack, Jr., as he is Attorney General of the Commonwealth of Massachusetts, and Foster Furcolo, as he is Governor of the Commonwealth of Massachusetts, are both entitled to notice as provided in 28 U.S.C. Sec. 2284 (2) hereby appeal to the Supreme Court of the United States from the Final Decree declaring Chapter 136 of the Massachusetts General Laws (Ter. Ed.) as amended, unconstitutional, void and unenforceable as applied to the plaintiffs, and enjoining and restraining the defendant Raymond P. Gallagher from enforcing Section 5 of said Chapter 136 as against the plaintiffs, said decree having been entered on June 12, 1959. The said defendants further appeal from the Denial of the Defendant's Motion to Dis- [fol. 245] miss, also entered on June 12, 1959, and from the Denial of the Defendant's Motion for a New Trial, entered on July 20, 1959.

This appeal is taken pursuant to 28 U.S.C. § 1253.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Summons
Complaint
Plaintiffs' Motion for Preliminary Injunction
Plaintiffs' Motion to Amend Complaint
Defendant's Motion to Dismiss Complaint
Defendant's Answer
Denial of Defendant's Motion to Dismiss
Stipulation as to Facts
Supplemental Stipulation as to Facts
Stenographic Record
Opinion of the Court
Dissenting Opinion
Final Decree
Defendant's Motion for New Trial
Opinion of Court Denying Defendant's Motion for New Trial

Denial of Defendant's Motion for New Trial
Memorandum Dissenting to Denial of Defendant's Motion for New Trial

The following questions are presented by this appeal:

1. Does a Three Judge Court have jurisdiction to enjoin a municipal police official from enforcing a statute on the ground that such statute is unconstitutional?

[fol. 246] 2. Are the plaintiffs proper parties to raise the issues before the Court?

3. Should the Court have exercised its equitable jurisdiction?

4. Do the provisions of the Massachusetts General Laws, Chapter 136 violate the rights, privileges or immunities of the plaintiffs under the Constitution of the United States in interfering with their freedom of religion, by depriving them of their liberty or property without due process of law or by denying them the equal protection of the laws?

5. Has the Three Judge Court correctly applied the Massachusetts statute as interpreted by the Supreme Judicial Court of the Commonwealth?

6. Is the evidence submitted to the Court sufficient as a matter of law to sustain the findings and decree?

7. Is the decree entered by the Court consistent with the findings of fact?

By their Attorneys

Edward J. McCormack, Jr., Attorney General for the Commonwealth of Massachusetts;

Joseph H. Elcock, Jr., Assistant Attorney General for the Commonwealth of Massachusetts;

John Warren McGarry, Assistant Attorney General for the Commonwealth of Massachusetts and member of the bar of the Supreme Court of the United States;

S. Thomas Martinelli, City Solicitor, Springfield, Massachusetts.

[fol. 247] Proof of Service (omitted in printing).

[fol. 247a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 248]

SUPREME COURT OF THE UNITED STATES

No. 532, October Term, 1959

GALLAGHER, Chief of Police of the City of Springfield, Massachusetts et al., Appellants,

vs.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., et al.

Appeal from the United States District Court for the District of Massachusetts.

ORDER NOTING PROBABLE JURISDICTION—April 25, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 25, 1960.

OFFICE COPY

SUPPLEMENTAL TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 11

GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL., APPELLANTS,

vs.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

FILED NOVEMBER 17, 1959
PROBABLE JURISDICTION NOTED APRIL 25, 1960

	Original	Print
Record from U.S.D.C. for the District of Massachusetts	191	191
Dissenting opinion McCarthy, J.—see page 149 of transcript of record		
Complaints of Edward T. Coleman, Gerald A. Driscoll and Thomas J. Kane against Harold Chernock d.b.a. Crown Market	191	191
Certificate of incorporation of Crown Kosher Super Market of Mass., Inc. with certificate of Secretary of the Commonwealth of Massachusetts	197	198
Defendant's bill of exceptions filed September 6, 1956	200	201
Brief for defendant	205	206
Brief for the Commonwealth of Massachusetts	211	210
Bill of complaint filed in the Superior Court in Equity of the County of Hampden with a request for a temporary restraining order	218	216
Subpoena, Notice upon application for preliminary injunction, and temporary restraining order	221	219
Appearance of Charles D. Sloan and Donald A. Clancy	223	222
Interlocutory decree continuing restraining order in force	225	223
Final decree dismissing bill	227	224
Docket entries in Superior Court, Common Law	229	235

[fol. 191]

[Stamp—Filed in Clerk's Office, June 4, 1959, United States District Court, District of Massachusetts]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

To the District Court of Springfield holden at Springfield for the transaction of criminal business, within the County of Hampden, EDWARD T. COLEMAN of Springfield, in said County, in behalf of The Commonwealth of Massachusetts, on oath complains that HAROLD CHERNOCK d.b.a. CROWN MARKET of said Springfield, in said County, on the Sixth day of June in the year of our Lord one thousand nine hundred and fifty four at said Springfield, in said County of Hampden and within the judicial district of said Court, said day being the Lord's Day did keep open his shop at 57 Sumner Avenue for the purpose of doing business therein, said business not being a work of necessity and charity, and said business not coming within the exceptions set out in Section 6 of Chapter 136 of the General Laws, as amended—

EDWARD T. COLEMAN
Complainant

Hampden, ss.

Received and sworn to this Seventh day of June in the year of our Lord one thousand nine hundred and fifty-four.

Before Said Court,

HARRY O. EBERHARDT
Assistant Clerk of said District Court of Springfield

[Seal]

JAMES J. LOVETT
2nd *Assistant Clerk of said Court*

May 26, 1959

A copy—Attest:
REH

[fol. 192]

VIO. LORD'S DAY

No. 172261

District Court of Springfield

COMMONWEALTH

vs.

HAROLD CHERNOCK d.b.a. CROWN MARKET

Received June 7, 1954

COMPLAINT

Hampden, ss. June 15 1954

By virtue of the within complaint, the Defendant is this day brought before said Court, and pleads not guilty—

Counsel for Commonwealth

Counsel for Defendant

On said last-named day, upon examination, it is considered by said Court, (Noonan, J.) that said Defendant is guilty.

It is therefore ordered by said Court that said Defendant pay a fine of fifteen dollars, NRA
and stand committed to the House of Correction
situate in said Springfield
till this sentence be performed.

From which sentence the Defendant appeals and he is ordered to recognize, in the sum of 100 dollars, to appear at Superior Court, to be held at said Springfield, on Monday June 21, 1954 and stand committed to the Common Jail until this order be complied with.

(Noonan, J.)

[Seal] HARRY O. EBERHARDT
Assistant Clerk.

May 26, 1959

A true copy. Attest:

.....
2nd Ass't. Clerk

THE COMMONWEALTH OF MASSACHUSETTS

Hampden, ss. A. D. 195

I have arrested the within-named Defendant and have brought him before said Court.

Police Officer

of Springfield

PENALTIES

[fol. 193]

[Stamp—Filed in Clerk's Office, June 4, 1959, United States District Court, District of Massachusetts]

THE COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

To the District Court of Springfield holden at Springfield for the transaction of criminal business, within the County of Hampden, GERALD A. DRISCOLL of Springfield, in said County, in behalf of The Commonwealth of Massachusetts, on oath complains that HAROLD CHERNOCK doing business as CROWN MARKET of said Springfield, in said County, on the Thirtieth day of May in the year of our Lord one thousand nine hundred and fifty four at said Springfield, in said County of Hampden and within the judicial district of said Court, said day being the Lord's Day did keep open his shop at 57 Sumner Avenue for the purpose of doing business therein, said business not being a work of necessity and charity, and said business not coming within the exceptions set out in Section 6 of Chapter 136 of the General Laws, as amended—

GERALD A. DRISCOLL
Complainant

Hampden, ss.

Received and sworn to this First day of June in the year of our Lord one thousand nine hundred and fifty four.

Before Said Court,

EDWARD T. COLLINS
Clerk of said District Court of Springfield

[Seal] JAMES J. LOVETT
2nd *Assistant Clerk of said Court*

May 26, 1959

A copy—Attest:

REH

[fol. 194]

VIO. LORD'S DAY

No. 171834

District Court of Springfield

COMMONWEALTH

vs.

HAROLD CHERNOCK doing business as CROWN MARKET

Received June 1, 1954.

COMPLAINT

Hampden, ss. June 15, 1954

By virtue of the within complaint, the Defendant is this day brought before said Court, and pleads not guilty—

Counsel for Commonwealth

Counsel for Defendant

On said last-named day, upon examination, it is considered by said Court, (Noonan, J.) that said Defendant is guilty.

It is therefore ordered by said Court that said Defendant pay a fine of fifteen dollars, NRA
and stand committed to the House of Correction
situate in said Springfield
till this sentence be performed.

From which sentence the Defendant appeals and he is ordered to recognize, in the sum of 100 dollars, to appear at Superior Court, to be held at said Springfield, on Monday June 21, 1954 and stand committed to the Common Jail until this order be complied with.

(Noonan, J.)

[Seal] HARRY O. EBERHARDT
Assistant Clerk.

May 26, 1959

A true copy. Attest:

JAMES J. LOVETT
2nd Ass't. Clerk

THE COMMONWEALTH OF MASSACHUSETTS

Hampden, ss. A. D. 195

I have arrested the within-named Defendant and have brought him before said Court.

Police Officer
of Springfield

PENALTIES

[fol. 195]

[Stamp—Filed in Clerk's Office, June 4, 1959, United States District Court, District of Massachusetts]

57 Sumner Avenue

THE COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

To the District Court of Springfield holden at Springfield for the transaction of criminal business, within the County of Hampden, THOMAS J. KANE of Springfield, in said County, in behalf of The Commonwealth of Massachusetts, on oath complains that HAROLD CHERNOCK doing business as CROWN MARKET of said Springfield, in said County, on the Second day of May in the year of our Lord one thousand nine hundred and fifty four at said Springfield, in said County of Hampden and within the judicial district of said Court, said day being the Lord's Day did keep open his shop at 57 Sumner Avenue for the purpose of doing business therein, said business not being a work of necessity and charity, and said business not coming within the exceptions set out in Section 6 of Chapter 136 of the General Laws, as amended—

THOMAS J. KANE
Complainant

Hampden, ss.

Received and sworn to this Twelfth day of May in the year of our Lord one thousand nine hundred and fifty-four.

Before Said Court,

HARRY O. EBERHARDT
Assistant Clerk of said District Court of Springfield

[Seal]

JAMES J. LOVETT
2nd *Assistant Clerk of said Court*

May 26, 1959

A copy—Attest:

REH

[fol. 196]

Vio. Lord's Day

No. 170637

District Court of Springfield

Commonwealth

vs.

Harold Chernock doing business as Crown Market

Received May 12, 1954

Complaint

Hampden. ss. May 14, 1954

By virtue of the within complaint, the Defendant is this day brought before said Court, and pleads not guilty— (O'Malley, J.) and this case is continued to the 28 day of May current, at 9 o'clock a.m., and Defendant is ordered to recognize in 100 dollars, for his appearance then before said Court. c June 9, 1954 c June 15

Counsel for Commonwealth

Counsel for Defendant Sherman E. Fein

On said last-named day, upon examination, it is considered by said Court, (Noonan, J.) that said Defendant is guilty.

It is therefore ordered by said Court that said Defendant pay a fine of fifteen dollars, and stand committed to the House of Correction situate in said Springfield till this sentence be performed. NRA

From which sentence the Defendant appeals and he is ordered to recognize, in the sum of 100 dollars, to appear at Superior Court, to be held at said Springfield, on Monday

June 21, 1954 and stand committed to the Common Jail until this order be complied with.

(Noonan, J.)

[Seal] HARRY O. EBERHARDT
Assistant Clerk.

May 26, 1959

A true copy. Attest:

JAMES J. LOVETT
2nd Ass't. Clerk

THE COMMONWEALTH OF MASSACHUSETTS

Hampden, ss. A. D. 195

I have arrested the within-named Defendant and have brought him before said Court.

Police Officer

of *Springfield*

PENALTIES

[fol. 197]

THE COMMONWEALTH OF MASSACHUSETTS

Crown Kosher
Super Market
of Mass., Inc.

Be it Known That whereas

Harold Chernock, Samuel Sowalsky,
Sam Smith, Jack Sloat,
Sherman E. Fein and Frances J. Simeoli

have associated themselves with the intention of forming a corporation under the name of

Crown Kosher Super Market of Mass., Inc.,

for the purpose of the following: To engage in the business of buying, selling and dealing, at wholesale and/or retail, in

meats, meat products, poultry, poultry products, provisions, food supplies, fish, game, produce and groceries; to purchase, build, construct or cause to be constructed, lease, or otherwise in any manner acquire, and maintain cold storage plants, refrigerators and buildings necessary for the conduct of said business. To negotiate, make and obtain loans, unsecured or secured by real estate, improved and unimproved, or by personal property, or upon personal security, and to lend money and extend credit, with or without security, to customers and others. To enter into, make and perform and carry out contracts of every sort and kind with any person, firm, association or corporation, municipality, body politic, county, territory, state, government or colony or dependency thereof, and, without limit as to amount, to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures and other negotiable or transferable instruments [fol. 198] and evidences of indebtedness, whether unsecured or secured by mortgage, pledge or otherwise, as well as to secure the same by mortgage, pledge and otherwise. To the same extent as natural persons might or could do, to purchase or otherwise acquire, and to hold, own, maintain, work, develop, sell, lease, exchange, hire, convey, mortgage, or otherwise dispose of and deal in lands and leaseholds, and any interest, estate, and rights in real property and any personal or leased property, and any franchises, rights, licenses, or privileges necessary, convenient or appropriate for any of the purposes herein expressed, incidental to the business;

with an authorized capital stock of one thousand two hundred shares, consisting of six hundred shares of class A common stock without par value and six hundred shares of class B common stock without par value. The amount of capital stock now to be issued is six hundred shares of class A common stock and six hundred shares of class B common stock, to be paid for as follows:—In Cash: in full, six hundred shares of class A common stock and six hundred shares of class B common stock;

and have complied with the provisions of the Statutes of this Commonwealth in such case made and provided, as appears

from the Articles of Organization of said corporation, duly approved by the Commissioner of Corporations and Taxation and recorded in this office:

Now, therefore, I, EDWARD J. CRONIN, Secretary of The Commonwealth of Massachusetts, DO HEREBY CERTIFY that said

Harold Chernock, Samuel Sowalsky,
Sam Smith, Jack Sloat,
Sherman E. Fein and Frances J. Simeoli,

their associates and successors, are legally organized and established, as, and are hereby made, an existing corporation as of July 29, 1953 under the name of

Crown Kosher Super Market of Mass., Inc.,

with the powers, rights and privileges, and subject to the limitations, duties and restrictions, which by law appertain thereto.

Witness my official signature hereunto subscribed, and the Great Seal of The Commonwealth of Massachusetts hereunto affixed, this tenth day of September in the year of our Lord one thousand nine hundred and fifty-three.

Edward J. Cronin
(L. S.) Secretary of the Commonwealth

Leo M. Harlow
Deputy Secretary

[fol. 199]

[Stamp—Filed in Clerk's Office, June 4, 1959, United States District Court, District of Massachusetts]

THE COMMONWEALTH OF MASSACHUSETTS

~~EDWARD~~ J. ~~CRONIN~~

SECRETARY OF THE COMMONWEALTH

Boston, May-6 1959

I HEREBY CERTIFY, that the foregoing is a true photostatic copy of the record of the Certificate of Incorporation of

Crown Kosher Super Market of Mass., Inc.

organized under the provisions of chapter one hundred and fifty-six of the General Laws.

WITNESS the Great Seal of the Commonwealth.

/s/ JOSEPH D. WARD

JOSEPH D. WARD

~~EDWARD~~ J. ~~CRONIN~~

Secretary of the Commonwealth.

[fol. 200]

[Stamp—Filed in Clerk's Office, June 4, 1959, United States District Court, District of Massachusetts]

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

Hampden County

COMMONWEALTH,

v.

HAROLD CHERNOCK

SAME v. SAME

SAME v. SAME

Defendant's Bill of Exceptions

This bill of exceptions arises from a conviction of the defendant for the alleged violation of the provisions of Chapter 136 of the General Laws of Massachusetts, relative to observance of the Lord's Day.

The defendant waived trial by Jury and the case was submitted on the following Statement of Agreed Facts:

"The Defendant is a combination Kosher market and super market and as a result of his religious convictions, is closed to business on each and every Saturday and each and every Jewish Holiday of the year, but remains open for business on Sundays.

The Defendant was summoned to appear before the District Court of Springfield on three complaints against him, charging that on May 2, 1954, May 30, 1954, and June 6, 1954, all of which dates were on Sunday, he did: "Keep [fol. 201] open his shop at 57 Sumner Avenue, in Springfield, for the purpose of doing business therein, said business not being a work of necessity and charity and said business not coming within the exceptions set out in Section 6 of Chapter 136 of the General Laws as amended."

The Defendant did sell at retail Kosher meats, bakery goods, vegetables and canned goods on May 2, 1954, May 30, 1954, and June 6, 1954, after the hours of ten o'clock in the forenoon; that the doors to the premises at said 57 Sumner Avenue were open after the hour of ten o'clock in the forenoon so as to admit the public for the purpose of doing business therein regarding all goods sold on the premises, and that on the said dates of May 2, 1954, May 30, 1954, and June 6, 1954, the defendant, after the opening hours of ten o'clock and continuing to closing time on the same dates, did sell to the public Kosher meats, as well as bakery goods, vegetables and canned goods of all types and descriptions.

On June 15, 1954, trial was had on the three above-mentioned complaints and the following motion was submitted by the defendant and disallowed:

"COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. DISTRICT COURT OF SPRINGFIELD

COMMONWEALTH

vs.

HAROLD CHERNOCK D/B/A Crown Market

MOTION TO DISMISS

Now comes the defendant and moves that the three complaints against him for keeping his shop open on the Lord's Day be dismissed for the following reasons:

1. That the complaints do not set forth a crime fully, plainly, substantially and formally as required by Article 12 of the Constitution and by the standing laws.

[fol. 202]

2. That the complaints charge that the defendant did: "keep open your shop at 57 Sumner Avenue for the purpose of doing business therein," which does not constitute a crime since the defendant is authorized to keep open his shop under the provisions of the 1950 amendment to Section 6 of Chapter 136 of the General Laws.

/s/ Sherman E. Fein
/s/ Justin G. Cavanaugh
By His Attorneys

The defendant was found guilty and fined fifteen dollars ($15) upon each complaint. Appeal was taken to the Superior Court of Hampden County.

/s/ STEPHEN A. MOYNAHAN
Stephen A. Moynahan, District Attorney for the Commonwealth

/s/ JUSTIN G. CAVANAUGH
Justin G. Cavanaugh, Attorney for Defendant"

At the hearing before Hon. Eugene A. Hudson, the only evidence submitted was the above Statement of Agreed Facts. Also submitted, was the following Motion to Dismiss which was denied, and the defendant found guilty:

"COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss. SUPERIOR COURT

COMMONWEALTH

vs.

HAROLD CHERNOCK D/B/A Crown Market

MOTION TO DISMISS

Now comes the defendant and moves that the three complaints against him for keeping his shop open on the Lord's Day be dismissed for the following reasons:

[fol. 203] 1. That the complaints do not set forth a crime fully, plainly, substantially and formally as required by Article 12 of the Constitution and by the standing laws.

2. That the complaints charge that the defendant did: "keep open your shop at 57 Sumner Avenue for the purpose of doing business therein," which does not constitute a crime since the defendant is authorized to keep open his shop under the provisions of the 1950 amendment to Section 6 of Chapter 136 of the General Laws.

/s/ SHERMAN E FEIN
/s/ JUSTIN G CAVANAUGH
By His Attorneys"

The defendant, being aggrieved by the judge's denial of his Motion to Dismiss, has duly claimed his exception and has duly filed this bill of exceptions.

This bill of exceptions contains all the evidence material to the issue involved.

By his attorneys, Fein, Cavanaugh & Kimball, By Justin G. Cavanaugh, Sherman E. Fein.

Filed September 6, 1956.

Allowed:
Eugene A. Hudson, Justice Superior Court.

Sept. 21st 1956

Copy.

Attest,

Edward G. Shea, Clerk.

[fol. 204]

Nos. 926, 927, and 928

COMMONWEALTH

v.

HAROLD CHERNOCK

SAME v. SAME

SAME v. SAME

DEFENDANT'S BILL OF EXCEPTIONS

Hampden County

[fol. 205]

[Stamp—Filed in Clerk's Office, June 4, 1959, United States District Court, District of Massachusetts]

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Hampden County September Sitting, 1957

Nos. 926, 927, 928

COMMONWEALTH

v.

HAROLD CHERNOCK

BRIEF FOR DEFENDANT

It is the contention of the defendant that the statement of agreed facts upon which this case is to be considered gives rise to the following issues:

1. Did the judge in the court below err in refusing to allow the defendant's motion to dismiss?

2. Does the original complaint offend article 2 of the Declaration of Rights of the Constitution of Massachusetts, and articles XI and XLVII of the amendments to the Constitution?

Issue No. 1

Chapter 136, section 5, of the General Laws of Massachusetts creates the offense under which the complaint of the Commonwealth originally issued. Specifically this section states: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and char-
[fol. 206] ity, shall be punished by a fine of not more than fifty dollars."

Proceeding under the above section, the complaint of the Commonwealth alleges that the defendant did "Keep

open his shop at 57 Sumner Avenue, in Springfield, for the purpose of doing business therein, said business not being a work of necessity and charity and said business not coming within the exceptions set out in Section 6 of Chapter 136 of the General Laws as amended." (R. 2.)

This complaint alleges neither the type of business transacted nor the time of day when said business allegedly was open for business. How, then, can it be determined whether or not the business alluded to in the complaint comes within the exceptions set out in section 6 of chapter 136 of the General Laws as amended? Clearly the mere keeping open of a place of business is not a crime if the type of business done comes within one of the exceptions in section 6. Equally clearly the defendant has the right to keep his place of business open at certain times for certain purposes.

Paragraph 4 of section 6 of chapter 136 specifically authorizes the keeping open of a place of business for "the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them . . ."

Paragraph 4 of this section further authorizes the keeping open of a place of business by a kosher market such as the defendant's for "the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, . . ."

Therefore it is obvious that the mere keeping open of a place of business on the Lord's Day is not an offense, but [fol. 207] rather the keeping open of said place of business for the sale of specific articles and at specific times which are not authorized by section 6 of chapter 136.

Since the complaint is not specific in these matters, the defendant contends that he was precluded from adequately preparing his defense.

In addition, paragraph 5 of section 6 of chapter 136, in referring to section 5, states: "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sab-

bath and actually refrains from secular business and labor on that day, *if he disturbs no other person thereby;* . . . "

Accordingly, in the absence of an allegation on the part of the Commonwealth that someone was disturbed by the defendant's performing of secular business and labor on Sunday, there was nothing illegal about the defendant's actions.

For these reasons, then, the defendant contends that the judge in the court below erred in disallowing the defendant's motion to dismiss.

Issue No. 2.

The guaranties of freedom of religion to citizens of the Commonwealth stem from these sources in the Constitution of Massachusetts:

Article II of the Declaration of Rights states: " . . . And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; . . . "

Article of Amendment XI states: " . . . and all religious sects and denominations, demeaning themselves peaceably, [fol. 208] and as good citizens of the Commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law."

Article of Amendment XVIII, section 1, states: "No law shall be passed prohibiting the free exercise of religion."

With such an impressive array of constitutional safeguards there surely can be no doubt concerning the desire of the Commonwealth to guard with jealous zeal the religious freedom of its citizens. How, then, can the conviction of the defendant be justified? It is clear that in the passage of section 6 of chapter 136 of the General Laws the Legislature intended that those individuals who observe Saturday as the Lord's Day and who refrain from work on that day shall be allowed to perform "secular business and labor" on Sunday. Certainly this legislative intent is contravened by a conviction which imposes a criminal penalty on a member of the Jewish faith who

conscientiously observes Saturday as the Sabbath but who works on Sunday. In effect such a conviction means that there is a penalty for being a member of the Jewish faith and that such a member is precluded from working six days a week if he wishes, while no such restriction exists upon his non-Jewish compatriots.

Rugg, C.J., in the case of *Glaser* v. *Congregation Kehillath Israel*, 263 Mass. 435, at 437, while commenting on the same constitutional provisions which are mentioned above, stated: "These great guaranties of religious liberty and equality before the law of all religions are not confined to adherents of the Christian religion or to societies and corporations organized for the promotion of Christianity. They extend likewise to the adherents of the ancient religion whose sacred scriptures form a part of the Bible. We are of opinion that Jews as well as Christians are protected by these explicit declarations of religious equality." [fol. 209] It is just this concept of the law that we respectfully urge upon this Court. If there are decisions in the law of our Commonwealth which tend to justify a conviction such as that represented here, then it is respectfully submitted that such decisions are antiquated and worthy of an enlightened and modern review.

In a Law Review article entitled "Sunday Statutes in a Modern Community" (Yale Law Journal, vol. 61, No. 3, March, 1952) which dealt with this entire topic the writer stated: "Clearly Sunday statutes are undesirable in a modern community." It is urged that this be the opinion of this worthy Court.

Respectfully submitted,

Fein, Cavanaugh & Kimball, Samuel L. Fein, Justin G. Cavanaugh, Sherman E. Fein, Attorneys for the Defendant.

[fol. 210]

Nos. 926, 927 and 928

COMMONWEALTH

v.

HAROLD CHERNOCK

BRIEF FOR DEFENDANT

Hampden County

[fol. 211]

[Stamp—Filed in Clerk's Office, June 4, 1959, United States District Court, District of Massachusetts]

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Hampden County September Sitting, 1957

Nos. 926, 927, 928

COMMONWEALTH

v.

HAROLD CHERNOCK

BRIEF FOR THE COMMONWEALTH

The defendant was found guilty in Hampden County Superior Court of three complaints of violating the provisions of chapter 136, section 5, of the General Laws of Massachusetts, relative to the observance of the Lord's Day. The defendant waived trial by jury and the case was submitted on a statement of agreed facts, which is set out in detail in the defendant's bill of exceptions.

Argument

The pertinent section and chapter of the General Laws involved in this case (section 5 of chapter 136) is expressed in clear and simple language, namely: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished . . ."

In the following section (section 6), which has the marginal note, "Limit of operation of preceding section," there [fol. 212] follow several paragraphs of limitations, qualifications and exceptions to the prohibitory provisions of section 5. Seldom has the legislature been so circumspect, so cautious and so discreet in its efforts to protect so many groups and classes of persons as it has in this section. Year after year succeeding legislatures have amended and added new language to exempt persons who may come within the phrase of exception contained in section 5, that is, "works of necessity and charity."

It is argued by the defendant that paragraph 4 of section 6 authorizes the keeping open of a place of business for "the making or selling by bakers or their employees [between certain hours] of bread or other food usually dealt in by them" and that further in the same paragraph 4 persons are authorized to keep open a place of business by a Kosher market such as the defendant's for "the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon." However, in this case, as set out in the statement of agreed facts, the defendant sold not only Kosher meats, but also bakery goods, "vegetables and canned goods of all types and descriptions," and the store of the defendant was open on the three Lord's Days set out in the complaints "for the purpose of doing business therein regarding all goods sold on the premises."

The word "shop," contained in section 5, does not have a restrictive meaning. In *Commonwealth* v. *Moriarty*, 311 Mass. 116, on page 119, the Court said: " . . . 'Shop,' in its popular as well as legal meaning, is not confined to a workshop. It is a word of various significance, and 'store'

and 'workshop' are both included in it, and do not exhaust its meaning."

It would not appear logical that the legislature intended the sale of goods such as those found in a so-called combi-[fol. 213] nation super-market and Kosher market, on the Lord's Day, to be work of necessity and charity. If such was the legislative intent, the statute specifically would be worded to include the exception.

In *Flagg* v. *Millbury*, 4 Cush. 243, at page 244, the Court held (as stated in the headnote) that "By a work of 'necessity,' . . . is not meant a physical and absolute necessity; but any labor, business or work, which is morally fit and proper to be done on that day, under the circumstances of the particular case, is a work of necessity within the statute."

In referring to a baker whose occupation is to bake bread and other articles of food on the Lord's Day the Court said in *Commonwealth* v. *Crowley*, 145 Mass. 430, on page 432: "That the interval may be short between the preparation of the food and the appearance of it on the table of the consumer, the baker is permitted to do his work, and deliver his viands, on the Lord's day. But this reason does not apply to sales of provisions which do not require preparation by the dealer for the immediate use of the purchaser. We cannot believe that the Legislature intended to include in the exception of the amendment all persons who deal in the products of bakeries. Such a construction of the statute would allow a large proportion of the grocers and provision dealers of the Commonwealth to open their shops every Lord's day."

In referring to an individual who observes Saturday as the Sabbath, our Supreme Judicial Court has rendered different opinions, but of the same general nature.

In *Commonwealth* v. *Has*, 122 Mass. 40, on page 41, the Court said: "Keeping open a shop is in itself a solicitation to do business, and thus an invitation to commit acts which the Legislature has treated as violations of the day. While those, who, for conscientious reasons, observe the seventh day of the week as the Sabbath, may do business or per-[fol. 214] form labor which does not interfere with others, they are entitled by keeping open their shops to invite the

violation of the provisions of the act, even if their ordinary business is shopkeeping."

In *Commonwealth* v. *Dextra,* 143 Mass. 28, on page 32, the Court said: " . . . that the law prohibits the keeping open a shop, warehouse, or workhouse for the purpose of doing business therein on the Lord's day; and that it is immaterial what that business may be."

In *Commonwealth* v. *Starr,* 144 Mass. 359, on page 361, the Court said: " . . . the facts that he was a Hebrew, who conscientiously believed that the seventh day of the week ought to be observed as the Sabbath, and that he actually refrained from secular business on that day, were immaterial."

The limitations as to the performance of labor, business or work, except works of necessity and charity, on Sunday should not be indicative as any restriction on the guaranties of freedom of religion to citizens of this great Commonwealth. Whether an individual desires to worship on the Lord's Day or whether he does not is a matter of individual choice, and General Laws, chapter 136, does not in any way bar such freedom of worship. And as was more amply set forth in *Commonwealth* v. *McCarthy,* 244 Mass. 484, on page 486, the Court said: "The statute prohibiting the performance of labor, business or work, except works of necessity and charity, on Sunday, was enacted to secure respect and reverence for the Lord's day. 'That the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. . . . Whatever inconvenience might result at the present day from the literal and general enforcement of the Lord's day act, and whatever hard cases may have arisen under it, it is still the law of the land, to be [fol. 215] judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute.'"

In the case of *Commonwealth* v. *Has,* 122 Mass. 40, the defendant contended that General Statutes, chapter 84, section 1 (which is now our General Laws, chapter 136, section 5), forbids to one who conscientiously observes the

seventh day of the week as the Sabbath the privilege of keeping open his shop on the first day of the week, that it is unconstitutional and in derogation of the Eleventh Amendment to the Constitution of the Commonwealth. However, the Court, on pages 41 and 42, said: "This act [General Statutes, Chapter 84, Section 1] has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose: and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and anyone, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any [fol. 216] subordination of his religion, but because as a member of the community, he must submit to the rules which are made by lawful authority to regulate and govern the business of that community."

Conclusion

The defendant has argued that, despite the fact that there are many decisions in our Commonwealth which would seem to uphold the convictions in these cases, both the law and the decisions are antiquated and need to be modernized and streamlined. If this were true (and the Commonwealth does not agree with any such school of thought), then a remedy should be sought from the legislature and not from the courts of the Commonwealth.

For the foregoing reasons, it is respectfully submitted that the defendant's exceptions in these cases should be overruled.

Respectfully submitted,

Stephen A. Moynahan, District Attorney, Edward J. Dobiecki, Assistant District Attorney, Western District of Massachusetts.

[fol. 217]

Nos. 926, 927, and 928

COMMONWEALTH

v.

HAROLD CHERNOCK

BRIEF FOR THE COMMONWEALTH

Hampden County

[fol. 218]
[Stamp—Filed in Clerk's Office, June 4, 1959, United States District Court, District of Massachusetts]

COMMONWEALTH OF MASSACHUSETTS

Hampden ss

SUPERIOR COURT
IN EQUITY

CROWN KOSHER SUPER MARKET OF MASS., INC., alias HAROLD CHERNOCK d/b/a CROWN MARKET, Petitioner,

vs.

RAYMOND P. GALLAGHER, in his position as Chief of Police of the City of Springfield, Massachusetts, Respondent.

BILL OF COMPLAINT

1. The petitioner is Crown Kosher Super Market of Mass. Inc., a corporation duly established by law and having a usual place of business at 57 Sumner Avenue, Springfield, in said County of Hampden, also known as Harold Chernock d/b/a Crown Market.

2. The respondent is Raymond P. Gallagher in his position as Chief of Police of the City of Springfield, Massachusetts.

3. The petitioner is engaged in the business of selling kosher food products, including kosher meat, and because of its status as a kosher market, the petitioner is closed to business on each and every Saturday and each and every Jewish holiday but remains open for business on Sundays.

4. On May 2, 1954, May 30, 1954, and June 6, 1954, all of which dates were on Sundays, members of the Springfield Police Department went to the Crown Market and made certain purchases.

5. As a result of these purchases, criminal complaints were issued by the District Court of Springfield, which

complaints alleged that the defendant did:— "keep open your shop at 57 Sumner Avenue for the purpose of doing business therein, said business not being a work of necessity and charity, and said business not coming within the exceptions set out in Section 6 of Chapter 136 of the General Laws as amended."

6. On June 15, 1954, trial was had on the three above-mentioned complaints and the petitioner found guilty and fined fifteen dollars ($15.00) upon each complaint. Appeal was taken to the Superior Court of Hampden County.

7. The respondent has threatened that he will continue to make criminal complaints against your petitioner if it keeps its place of business open on Sundays for the purpose of doing business therein, and if the respondent continues to serve complaints upon the petitioner during the pendancy [sic] of the present appeal, irreparable harm will be caused to the petitioner in the conduct of its business.

Wherefore, Your Petitioner Prays:

1. That this Honorable Court issue a temporary restraining order restraining the Chief of Police of the City of Springfield from serving or causing to be served on Sunday, June 20, 1954, a complaint under Section 6 of Chapter 136, of the General Laws, as amended.

2. That this Honorable Court issue a preliminary injunction enjoining the Chief of Police of the City of Springfield from serving or causing to be served fur- [fol. 219] ther complaints upon the petitioner until such time as the question of so-called "Sunday Law" violations on the part of the petitioner's market shall have been decided on appeal.

3. That this Honorable Court grant such other and further relief as may be meet and just.

Crown Kosher Super Market of Mass., Inc., alias Harold Chernock d/b/a Crown Market, By Samuel L. Fein, Sherman E. Fein, Its Attorneys.

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss: June 18, 1954

Personally appeared before me Samuel L. Fein, and made oath that he has read the foregoing Bill of Complaint, and knows the contents thereof; and that the facts stated therein are true of his own knowledge, except such as are stated to be alleged on information and belief, and as to those that he believes them to be true.

Edward J. Farrell, Notary Public.

Filed June 18, 1954

Endorsed on back as follows:

Hampden, ss: Springfield June 18, 1954
Ordered, that notice issue, returnable into this Court on Friday, the 25th day of June 1954, at 10 o'clock A. M. at said Springfield to show cause why an application for a preliminary injunction should not be granted as prayed for in the bill; with a temporary restraining order under the first prayer.

By the Court (Warner, J.)
Helen Z. Greeley, Ass't. Clerk.

A true copy,

Attest:

Helen Z. Greeley, Assistant Clerk.

[fol. 220]

81716

CROWN KOSHER SUPER MARKET OF MASS. INC. alias HAROLD CHERNOCK d/b/a CROWN MARKET, Petitioner,

vs.

RAYMOND P. GALLAGHER, in his position as Chief of Police of the City of Springfield, Massachusetts, Respondent.

BILL OF COMPLAINT

[fol. 221]

COMMONWEALTH OF MASSACHUSETTS

(LS)

HAMPDEN, ss.

To Raymond P. Gallagher, in his position as Chief of Police of the City of Springfield, Massachusetts

GREETING:

Whereas a suit in equity has been begun against you in our Superior Court, within and for the county of Hampden, by Crown Kosher Super Market of Mass., Inc., a corporation duly established by law and having a usual place of business at 57 Sumner Avenue, Springfield, in the County of Hampden, also known as Harold Chernock d/b/a Crown Market

WE COMMAND YOU, if you intend to make any defense, that on the *first Monday of* July *next, which Monday is* the return day of this subpoena, or within *such further time as the law allows,*

you do cause your written appearance to be entered and your written answer or other lawful pleading to be filed in the office of the clerk of said court at Springfield in said county first above named, and further that you defend against said suit according to law, if you intend to make any defense, and that you do and receive what the court shall order, adjudge and decree therein.

Hereof fail not, at your peril, as otherwise said suit may be adjudged, and orders and decrees entered therein, in your absence.

WE ALSO NOTIFY YOU that application has been made in said suit, as appears in *the bill of complaint* filed therein, for a preliminary injunction

and that a hearing upon such application will be held at the court house at *said Springfield*

on Friday the twenty-fifth day of June A. D. 1954, at ten o'clock A. M., at which you may appear and show cause why such application should not be granted.

In the meantime, until such hearing, WE COMMAND YOU, Raymond P. Gallagher, Chief of Police of the City of Springfield and your agents, attorneys and counsellors, and each and every one of them, to desist and refrain from serving or causing to be served on Sunday, June 20, 1954, a complaint under Section 6 of Chapter 136, of the General Laws, as amended:

WITNESS, JOHN P. HIGGINS, CHIEF JUSTICE of our Superior Court, the eighteenth day of June in the year of our Lord one thousand nine hundred and fifty-four.

[Seal] EDWARD G. SHEA Clerk.
/s/ HELEN Z. GREELEY Ass't. Clerk

A true copy,

Attest:

[fol. 222]

No. 31716 Eq.

CROWN KOSHER SUPER MARKET OF MASS. INC., alias

vs.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield

SUBPOENA

NOTICE UPON APPLICATION FOR PRELIMINARY INJUNCTION,

and

TEMPORARY RESTRAINING ORDER

Returned June 22, 1954

A true copy,

Attest:

/s/ HELEN Z. GREELEY
Ass't. Clerk

[Seal]

Officer's Return
Hampden, ss: June 18, A. D. 1954

City of Springfield

By virtue of this Subpoena Notice Upon Application for Preliminary Injunction and Temporary Restraining Order, I this day at 15 minutes past 4 o'clock in the afternoon, served on the within named Raymond P. Gallagher, Chief of Police of the City of Springfield, by giving in hand to him, a true and attested copy of the above described Subpoena and Order, for his appearance at Court as within directed. Said service was made at No. 80 Court Street, in Springfield, in the said County of Hampden.

JOSEPH ASCHER
Deputy Sheriff

FEES:

Service	2.00
Copy	1.00
Travel	.10
	$3.10

[Seal]

A true copy,

Attest:

/s/ HELEN Z. GREELEY
Assistant Clerk

[fol. 223]

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss. SUPERIOR COURT IN EQUITY

#81716

CROWN KOSHER SUPER MARKET OF MASS., INC., otherwise HAROLD CHERNOCK doing business as CROWN MARKET, Petitioner,

vs.

RAYMOND P. GALLAGHER, as he is Chief of Police of the City of Springfield, Respondent.

APPEARANCE

In the above entitled matter we hereby appear as attorneys for the respondent.

Charles D. Sloan, Donald A. Clancy

Filed: June 25, 1954.

A true copy.

Attest:

Helen Z. Greeley, Assistant Clerk.

[fol. 224]

No. 81716

CROWN KOSHER SUPER MARKET OF MASS., INC. (alias), (in eq.),

vs.

RAYMOND P. GALLAGHER, as he is Chief of Police of the City of Springfield.

Copy of

APPEARANCE

[fol. 225]

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

SUPERIOR COURT
No. 81716

CROWN KOSHER SUPER MARKET OF MASS. INC. alias HAROLD CHERNOCK d/b/a CROWN MARKET, Petitioner,

vs.

RAYMOND P. GALLAGHER, in his position as Chief of Police of the City of Springfield, Massachusetts, Defendant.

INTERLOCUTORY DECREE CONTINUING RESTRAINING ORDER IN FORCE

This cause came on to be heard upon the return of a notice to show cause with a temporary restraining order and was argued by counsel and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that said restraining order be and hereby is continued in force pending the final determination of this suit.

[Seal] By the Court (Warner J.)

Edward J. McKay, Assistant Clerk.

Entered June 25, 1954

A true copy,

Attest:

Helen Z. Greeley, Assistant Clerk.

[fol. 226]

No. 81716

CROWN KOSHER SUPER MARKET OF MASS., INC. alias

vs.

RAYMOND P. GALLAGHER

Copy of

INTERLOCUTORY DECREE CONTINUING RESTRAINING ORDER IN FORCE

[fol. 227]

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss. SUPERIOR COURT IN EQUITY

No. 81716

CROWN KOSHER SUPER MARKET OF MASS., INC. alias HAROLD CHERNOCK d/b/a CROWN MARKET, Petitioner,

vs.

RAYMOND P. GALLAGHER, in his position as Chief of Police of the City of Springfield, Massachusetts, Respondent.

FINAL DECREE DISMISSING BILL

and thereupon, upon consideration thereof, the plaintiff, consenting hereto, in writing

it is ordered, adjudged and decreed that the bill be and hereby is—DISMISSED.

By the Court (O'Brien J.)

Helen Z. Greeley, Assistant Clerk.

[Seal]

Entered October 6, 1958

Assented to:—

Samuel L. Fein

Samuel L. Fein, atty. for Crown Kosher Super Market of Mass., Inc. alias

A true copy,

Attest:

Helen Z. Greeley, Ass't. Clerk

[fol. 228]

No. 81716

CROWN KOSHER SUPER MARKET OF MASS., INC. alias

vs.

RAYMOND P. GALLAGHER

Copy of

FINAL DECREE DISMISSING BILL

[fol. 229]

SUPERIOR COURT, COMMON LAW

No. 81716

CROWN KOSHER SUPER MARKET OF MASS., INC. (alias) (in eq.)

vs.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts

COUNSEL FOR PLAINTIFF

Fein, Cavanaugh, Mitchell & Kimball (1421 Main)

COUNSEL FOR DEFENDANT

Charles D. Sloan) (Law Department, City Hall)
Donald A. Clancy)

DATE	NO.	DOCKET ENTRIES
1954		
June 18		Entered.
		Order of notice to show cause to issue returnable Friday the 25th. day of June current at 10 o'clock A.M.
		Restraining order to issue under first prayer (Warner, Justice).
	1	Subpoena issued returnable 1st. Monday July; notice to show cause and restraining order issued.
22	√	Subpoena returned.
25	2	Appearance—Charles D. Sloan, Donald A. Clancy for respondent.
	3	Interlocutory decree continuing restraining order in force (Warner, Justice).
1958		
June 3	√	Inactive.
Oct. 6	4	Final Decree Dismissing Bill. (O'Brien, Justice).

1958 November 3

A true copy of the Docket Minutes.

[Seal]

In Witness Whereof, I hereunto set my hand and have caused the seal of said court to be affixed on this twenty-ninth day of May, in the year of our Lord one thousand nine hundred and fifty-nine.

Helen Z. Greeley, Assistant Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1959

No. [illegible]

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, FOSTER FURCOLO, GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS AND EDWARD J. McCORMACK, JR., ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellants,

vs.

CROWN KOSHER SUPER MARKET OF MASS., INC., IRVING HEALITZ, MORRIS CHAITOVSKY, RUTH B. COHEN, AND RABBI MOSES D. SHEINKOPF,

Appellees.

JURISDICTIONAL STATEMENT

EDWARD J. McCORMACK, JR.,
Attorney General
State House, Boston

JOSEPH H. ELCOCK, JR.
Assistant Attorney General
State House, Boston

JOHN WARREN McGARRY
Assistant Attorney General
State House, Boston

S. THOMAS MARTINELLI
City Solicitor
City Hall, Springfield

TABLE OF CONTENTS

Jurisdictional Statement	1
Opinion of the Court (Appendix A)	9
Dissent (Appendix B)	30
Opinion of the Court on Petition for Rehearing (Appendix C)	64
Memorandum on Rehearing (Appendix D)	69
Mass. Gen. Laws, Chap. 136, § 6 (Appendix E)	71

United States District Court

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action, No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,

Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, CHIEF ORTHODOX RABBI OF THE UNITED ORTHODOX CONGREGATIONS OF SPRINGFIELD AND PRESIDENT OF THE MASSACHUSETTS COUNCIL OF RABBIS, suing on behalf of himself and other Rabbis similarly situated,

Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS,

Defendant

JURISDICTIONAL STATEMENT

(A) On May 18, 1959 a three-judge court for the District of Massachusetts, through a majority of its members, delivered the "Opinion of the Court" on the ques-

tion of the constitutionality of a state statute; McCarthy, District Judge, entered his dissenting opinion. On July 20, 1959, the court again through a majority rendered its opinion denying appellant's motion for a new trial; McCarthy, J. filed a dissenting memorandum on July 23, 1959. None has been reported. Copies of these opinions are appended in Appendices "A—D."

(B) The jurisdiction of this court is invoked under the provisions of 28 U.S.C., § 1253 and § 2101 (b). The appeal is from a final decree of a three-judge court granting a permanent injunction against a public official prohibiting the enforcement of a state statute on the grounds that such statute is unconstitutional.

(*i*) This suit was instituted in the form of a complaint seeking a declaration of the rights and other legal relations of the parties named therein pursuant to 28 U.S.C. §§ 2201-2202, and seeking a preliminary and a permanent injunction to restrain the enforcement, operation or execution of a state statute upon the grounds of unconstitutionality. A three-judge court was convened for this purpose pursuant to the provisions of 28 U.S.C., §§ 2281 and 2284.

The complaint alleges that the statute in question regulating the observance of Sunday constituted a deprivation of the constitutional rights of the petitioners.

(*ii*) On June 12, 1959, the defendant's motion to dismiss was denied and a final decree was entered in the United States District Court for the District of Massachusetts, declaring Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, unconstitutional, void and unenforceable as applied to the plaintiffs, and enjoining and restraining the defendant Raymond P. Gallagher, Chief of Police of the City of Springfield, Massachusetts, from

enforcing Section 5 of said Chapter 136 as against the plaintiffs.

A motion for new trial was filed on June 22, 1959 and this motion was denied on July 20, 1959.

On September 18, 1959, the defendant caused to be entered in the United States District Court for the District of Massachusetts its notice of appeal to the Supreme Court of the United States.

(*iii*) Jurisdiction of this appeal is conferred on the Supreme Court of the United States by 28 U.S.C. §§ 1253, 2101 (b).

(*iv*) The jurisdiction of this Court is sustained in *Radio Corp. of America* v. *United States*, 71 S. Ct. 806, 341 U.S. 412, 95 L. Ed. 1062.

(*v*) The state statute in question is Massachusetts G.L. (Ter. Ed.) c. 136, §§ 5, 6. Section 5 reads as follows: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars." Section 6, which lists numerous exceptions to section 5, is set forth in full in Appendix "E."

(C) The following questions are presented by this appeal:

1. Does a Three Judge Court have jurisdiction to enjoin a municipal police official from enforcing a statute on the ground that such statute is unconstitutional?

2. Are the plaintiffs proper parties to raise the issues before the Court?

3. Should the Court have exercised its equitable jurisdiction?

4. Do the provisions of the Massachusetts General Laws, Chapter 136 violate the rights, privileges or im-

munities of the plaintiffs under the Constitution of the United States in interfering with their freedom of religion, by depriving them of their liberty or property without due process of law or by denying them the equal protection of the laws?

5. Has the Three Judge Court correctly applied the Massachusetts statute as interpreted by the Supreme Judicial Court of the Commonwealth?

6. Is the evidence submitted to the Court sufficient as a matter of law to sustain the findings and decree?

7. Is the decree entered by the Court consistent with the findings of fact?

(D) The petitioner Crown Kosher Super Market of Mass., Inc. operates a super market in the city of Springfield, Mass., at which all types of meats and groceries were sold including all varieties of kosher foods. The officials owning and operating the market contended that their religious beliefs made it necessary for them to close the market at sun-down on Fridays and to remain closed through sun-down on Saturdays. The market was accordingly closed during these periods but was opened all day on Sundays in violation of Mass. G.L. c. 136, §§ 5 and 6, which makes it a criminal offense to keep open one's shop on Sunday. There are certain exceptions to this prohibition including an exception allowing a kosher meat market to open for the sale of kosher meat on Sunday between the hours of six o'clock and ten o'clock in the forenoon. In 1957 one Harold Chernock, the president and general manager of the corporate plaintiff, Crown Kosher Super Market of Mass., Inc. was convicted in the state courts for keeping open the market in violation of these statutory provisions, *Commonwealth v. Chernock*, 336 Mass. 384 (1957).

An equity proceeding in the State courts was also brought by the said Chernock to test the constitutionality of the statute in question but this suit was dismissed by the petitioner. Thereafter the corporate plaintiff together with the other named plaintiffs instituted the present proceeding asserting that the Massachusetts statutory provisions regulating the observance of Sunday is one respecting the establishment of religion, and deprives the plaintiff of their liberty and property arbitrarily, denies the free exercise thereof, and hence is violative of the due process clause of the Fourteenth Amendment to the United States Constitution; and on the further ground that it denies the equal protection of the laws guaranteed by the Fourteenth Amendment.

The plaintiffs allege that they have no adequate remedy at law and that they will suffer irreparable injury in that the corporate plaintiff will suffer a loss in its gross business by being closed on Sunday, the plaintiff Rabbi will be unable to fulfill his religious duties, and the plaintiff customers will be unable to secure certain provisions prepared in accordance with their religion at times when they are able to purchase them.

Plaintiffs' motion for a preliminary injunction was not pressed; defendant filed a motion to dismiss which was consolidated with the hearing on the merits at the conclusion of which defendant's motion to dismiss was denied and the court, through a majority of its members rendered an opinion concluding that G. L. c. 136, § 5 is in violation of all the constitutional safeguards enumerated by the plaintiffs in their Complaint, and entered its Final Decree declaring (1) said statute "unconstitutional, void and unenforceable as applied to the plaintiffs

in this action, insofar as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday"; (2) enjoining and restraining "the defendant, his agents, servants, and employees, and all others acting in his behalf . . . from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce Section 5 of said Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, against the plaintiffs in this action."

(E) A substantial Federal question is involved because a three-judge court has held to be unconstitutional a state statute of long standing restricting activities on Sunday, which statute was passed as an exercise of the legitimate police power of the state within a field which has many times been held by the United States Supreme Court to constitute a valid exercise of such power. A determination that the statute is unconstitutional will have a profound effect on the economy of the Commonwealth and will constitute an unwarranted limitation on the power of the Commonwealth to legislate. Under these circumstances the question should not be determined without briefs and oral arguments.

It is noted, of course, that in a situation where a public official has been permanently enjoined by a three-judge court from enforcing a state statute, Title 28 U.S.C. § 1253, grants a direct right of appeal to the Supreme Court.

In addition to the question of constitutionality, the final decree on its face is ambiguous as to its scope and constitutes a pre-emption of the legislative powers of the Commonwealth of Massachusetts by creating an exception to the prohibitions of the Massachusetts Sunday law

in favor of one group of persons to the detriment of another.

For the foregoing reasons it is respectfully urged that plenary consideration is in order.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General
for the Commonwealth of Massachusetts.

JOSEPH H. ELCOCK, JR.,
Assistant Attorney General
for the Commonwealth of Massachusetts.

JOHN WARREN McGARRY,
Assistant Attorney General
for the Commonwealth of Massachusetts.
and member of the bar of the Supreme Court of the United States.

S. THOMAS MARTINELLI,
City Solicitor,
Springfield, Massachusetts.

APPENDIX A.

United States District Court

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action, No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,

Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, CHIEF ORTHODOX RABBI OF THE UNITED ORTHODOX CONGREGATIONS OF SPRINGFIELD AND PRESIDENT OF THE MASSACHUSETTS COUNCIL OF RABBIS, suing on behalf of himself and other Rabbis similarly situated,

Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS,

Defendant

Before
MAGRUDER and WOODBURY, *Circuit Judges*,
and McCARTHY, *District Judge*

HERBERT B. EHRMANN,
SAMUEL MARKELL,
EDWARD L. LAVINE,
Goulston & Storrs,

IRVING S. RIBICOFF,
DAVID KOTKIN,
Ribicoff and Kotkin,
64 Pearl Street,
Hartford, Conn.

SAMUEL L. FEIN,
Fein, Cavanaugh & Kimball,
1421 Main Street,
Springfield, Mass.
for Plaintiffs.

S. THOMAS MARTINELLI,
Assistant City Solicitor,

MATTHEW J. RYAN, JR.,
City Solicitor,

JOHN J. O'CONNOR,
Assistant City Solicitor,
for Defendant.

JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,

EDWARD A. McCORMACK, JR.,
Attorney General,
for the Commonwealth of Massachusetts.

LEO PFEFFER,
for the International Religious Liberty Association,

HOWARD S. WHITESIDE,
for the Southern New England Conference of Seventh Day Adventists,

HENRY M. LEEN,
for the Archdiocesan Council of Catholic Men,

HERBERT S. AVERY,
for The Lord's Day League of New England,
Amici Curiae.

OPINION OF THE COURT.

MAY 18, 1959.

MAGRUDER, Circuit Judge. It is always an unpleasant task for a lower federal court to sit in review upon the constitutionality of state legislation, but sometimes a

three-judge district court can find no escape from doing that, under 28 U.S.C. §§ 1331, 1343, 2281 and 2284. We believe the present to be such a case.

The attack which we have to consider is upon the validity, under the Federal Constitution, of the modern version of what started as one of the famous "blue laws" enacted by the Great and General Court of Massachusetts in colonial days. Specifically, we refer to the so-called "Lord's day" statute, still on the books in Massachusetts. So far as we are aware, the Supreme Judicial Court has had no occasion to pass on the validity of this statute under the Federal Constitution, though that court has, rather gingerly and briefly, upheld the statute against attacks based upon the state constitution. See *Commonwealth* v. *Has*, 122 Mass. 40 (1877); *Commonwealth* v. *Chernock*, 336 Mass. 384 (1957).

The federal complaint now before us seeks a declaration that certain provisions of the "Lord's day" statute of Massachusetts are unconstitutional, as applied to the plaintiffs. Preliminary and final injunctions restraining the defendant, the Chief of Police of the City of Springfield, from enforcing against the plaintiffs the criminal provisions of the law were asked for. A three-judge court was designated to hear the suit, pursuant to the provisions of 28 U.S.C. §§ 2281 and 2284. The motion for a preliminary injunction was not pressed, after the parties had informally agreed that the plaintiffs would not be prosecuted until after decision of this case. The defendant filed a motion to dismiss, which was consolidated with the hearing on the merits before this court.

Counsel for the Commonwealth has appeared to oppose the relief prayed, and by leave of court consolidated briefs were filed on behalf of two pairs of amici curiae,

The Lord's Day League of New England and the Archdiocesan Council of Catholic Men, arguing that the statute should be upheld, and the International Religious Liberty Association, together with the Southern New England Conference of Seventh Day Adventists, urging that the statute is unconstitutional.

Joined as plaintiffs were Crown Kosher Super Market of Mass., Inc., a corporation operating a kosher supermarket in Springfield, Massachusetts, three named customers thereof, suing on behalf of themselves and others similarly situated, and a rabbi suing on behalf of himself and other rabbis similarly situated.

Most of the facts were stipulated by the parties, but some additional oral and documentary evidence was presented by the plaintiffs at the hearing before us.

The corporate plaintiff's supermarket (hereinafter called the Crown Market) offers for sale all categories of food ("one stop shopping"); all of its meats and meat products are kosher, and something like 95 per cent of the rest of its stock is kosher. The Crown Market is the only store of this kind in the area of Springfield; apparently it is the only one within 26 miles or more.[1] But Springfield has several kosher butcher shops and some

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[1] The testimony that the nearest similar store was in Hartford, Connecticut (about 26 miles to the south), was not rebutted, and is corroborated by the fact that the list of customers attached to the complaint contains names of persons coming from the following towns in addition to Springfield (approximate distance and direction from Springfield are noted parenthetically):

Brattleboro, Vt. (60 mi. N)
Pittsfield, Mass. (53 mi. WNW)
Athol, Mass. (50 mi. NE)
Turners Falls, Mass. (43 mi. NNE)
Greenfield, Mass. (39 mi. N)
Ware, Mass. (25 mi. ENE)
Holyoke, Mass. (12 mi. NNE)
Westfield, Mass. (9 mi. W)
Enfield, Conn. (9 mi. S)
Agawam, Mass. (4 mi. SSW)
Longmeadow, Mass. (3 mi. S)
W. Springfield, Mass. (3 mi. W)

delicatessen shops and supermarkets which sell certain kosher products.

The four officers and stockholders and the six directors of the corporate plaintiff are all adherents of the Orthodox Jewish faith, who duly observe the Jewish Sabbath, from sundown Friday to sundown Saturday. A very substantial percentage of the corporate plaintiff's customers are Orthodox Jews, and most of the others are Conservative Jews who observe the Jewish Sabbath.

The due observance of the Jewish Sabbath requires total abstinence from business and work of even the most trivial sort. Any riding in automobiles or other conveyances and walking extraordinary distances are forbidden. With particular reference to this case, the religious belief of the officers, directors and stockholders of the corporate plaintiff completely precludes the operation of the store on the Jewish Sabbath, since that would be doing business vicariously and causing others to work on the Sabbath. The large majority of Crown Market's customers, who share these beliefs, may not shop on the Sabbath, nor may they cook. Preparation for meals during the 24 hours of the Jewish Sabbath, and especially for the traditional family feast on Friday night, consumes most of the daylight hours on Friday.

It follows that the Crown Market (like other kosher stores) is not open for business between sundown Friday and sundown Saturday, and on thirteen Jewish holidays each year. Even if the store were open on Saturday, the great majority of its patrons could not take advantage of it, just as they cannot take advantage of the other stores which are open Friday night and Saturday and sell some kosher food. Business considerations make operation on Saturday night impracticable. If, after sundown, the

store were prepared for business (for instance, by cutting meat) and were then opened, few hours would remain before a suitable closing time; the twelve store employees (six of whom are butchers) would demand extra wages for their trouble, and most customers would find it inconvenient, if not impossible, to shop during those night hours, especially those who would have to travel significant distances starting after sundown.

But it is common knowledge that the normal pattern of a grocery store's business shows a gradual increase in volume, from very little business on Monday to somewhat more during the day on Friday. The stores are jammed and a vast amount of business is done on Friday evening and Saturday. Since the Orthodox and Sabbath-observing Conservative Jews, such as the customers of the corporate plaintiff, cannot shop on Friday night or Saturday, and they have spent the Sabbath as a day of rest or religious celebration and family communion, Sunday is the only day which has for them the advantages as a shopping day that Saturday has for the majority of the people.

Under these circumstances, it is not surprising that more than one third of Crown Market's gross sales each week are made on Sunday. It would not be practicable for Crown Market to sell only kosher meat from 6 A.M. to 10 A.M. on Sunday, as permitted by law, for economic reasons similar to those preventing operations on Saturday night after sundown. The few sales would not justify the great expense.

The Crown Market is open for business from 8 A.M. to 6 P.M. every Sunday, and has been open every Sunday (excluding Jewish holidays) since it was established August 18, 1953. It thus has been and is violating the

statute, the constitutionality of which is being attacked in this proceeding. The manager of the Crown Market (who is also the corporate plaintiff's president and owns 50 per cent of the stock thereof) was convicted of violation of the challenged provisions of the Lord's day law in the Massachusetts state court. His exceptions in that trial, which questioned the constitutionality of the law under the state constitution but raised no federal constitutional issue, were overruled by the Supreme Judicial Court. *Commonwealth* v. *Chernock*, supra, 336 Mass. 384 (1957). Even if the defendant had pleaded res judicata (which he has not, see Rule 8(c), F.R.C.P.), it seems obvious enough that the corporate plaintiff is not bound by *Commonwealth* v. *Chernock*, nor is any of the individual plaintiffs.

The defendant threatens to enforce the law to the full extent of his authority. Thus it must be taken that he will institute repeated criminal prosecutions against the corporate plaintiff, its four officers and stockholders, and its six directors and twelve employees, for each violation, that is, for each Sunday on which Crown Market is open for business.

Two of the three named customer-plaintiffs are residents of Springfield and the third is a resident of Turners Falls, 43 miles to the north. All are Orthodox Jews who are regular customers of the corporate plaintiff's store. These three customers adequately represent a class of Orthodox Jewish people of the area served by the corporate plaintiff's store; they seek to enforce, by obtaining a common relief, their several rights which depend, however, on common questions of law and fact within the meaning of Rule 23(a) (3), F.R.C.P.

The named plaintiff-rabbi is the Chief Orthodox Rabbi

of The United Orthodox Congregations of Springfield and is the president of the Massachusetts Council of Rabbis. He has been duly authorized by the latter organization to represent it in the prosecution of this action. Besides his religious duties as leader and teacher of his congregation, this rabbi has the duty (which he may and in fact does discharge through an inspector appointed by him) of inspecting kosher markets and butcher shops daily except on the Jewish Sabbath to ensure compliance with Jewish dietary laws. The inspector comes to the Crown Market at 8 A.M. on Sunday for the washing of any meat from animals slaughtered on the previous Thursday which is on hand. Among the dietary rules enforced is that fresh meat must be rewashed every 72 hours, that only meats and seafood of certain kinds and quality may be eaten, and that meat and dairy products must not be commingled, even by the use of the same implements for both. We think that the plaintiff-rabbi adequately represents a class, and that this class seeks to enforce by a common relief certain common rights and certain several rights which depend upon common questions of law and fact within the meaning of Rule 23(a)(1) and (3), F.R.C.P.

Preliminarily the defendant relies upon a point of equity jurisdiction based upon the justifiable reluctance of federal courts of equity to interfere by way of injunction with the operation of a state criminal statute. As stated in *Spielman Motor Sales Co., Inc.* v. *Dodge*, 295 U.S. 89, 95 (1935), "there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." In *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), in which similar language occurs, the actual decision was that the bill should be dismissed for "want of equity".

since an injunction against enforcement of the ordinance was unnecessary because, in parallel litigation, the Supreme Court had already adjudicated that the ordinance was unconstitutional. *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

It would be nice if we could say to these plaintiffs, "Go ahead and violate the challenged statute, and urge your defense based upon federal constitutional grounds in the course of the state court proceeding." But the matter is not so simple as that. It seems clear, from the recent decision in *Evers* v. *Dwyer*, 358 U.S. 202 (1958), that when enforcement of a state criminal statute results in the denial of civil rights of a citizen and the state officials intend to enforce the statute unless and until its unconstitutionality has been finally adjudicated, a three-judge district court may not decline as a matter of discretion to take jurisdiction of a suit to enjoin the operation of the statute. Furthermore, this argument by the defendant really relates only to the corporate plaintiff. Because there is an exception in the statute that permits persons situated as are the plaintiff-customers and the plaintiff-rabbis to perform "secular business and labor" on Sunday, these particular individual plaintiffs cannot, either by shopping at the corporate plaintiff's store or by inspecting it, or by any other act in the capacities in which they appear here, violate the Sunday law. It is evident that for them the *only* method by which they can vindicate the constitutional rights claimed is by obtaining equitable relief.

As stated in the complaint, the grounds for challenging the Sunday law are all founded upon the Fourteenth Amendment. Simply stated, these are: (1) That the Lord's day law is a law respecting the establishment of

religion and denying the free exercise of religion and hence is violative of the due process clause of the Fourteenth Amendment. See *Douglas* v. *City of Jeannette*, supra, 319 U.S. at 162; (2) that the statute deprives the corporate plaintiff of its property and the other plaintiffs of their liberty arbitrarily and therefore is a denial of due process of law guaranteed by the Fourteenth Amendment; and (3) that the statute denies the corporate plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. [It can hardly be disputed that the corporate plaintiff has standing to assert the grounds numbered 2 and 3 *supra*, and that the individual plaintiffs have standing to assert the grounds numbered 1 and 2 *supra*.] If we were required to go into the matter, which we are not now, we would be prepared to hold that the facts of this case bring it squarely within the exception to the Supreme Court's "rule of practice" forbidding one party to assert somebody else's constitutional rights, so that all plaintiffs could argue all grounds. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Pearl Assurance Co., Ltd.* v. *Harrington*, 38 F. Supp. 411 (D.Mass. 1941), aff'd 313 U.S. 549 (1941); *Bartels* v. *Iowa*, 262 U.S. 404, 410–11 (1923); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

It is clear that the first Sunday law, enacted in 1653, and the various modified versions thereof also enacted in the colonial period, had the religious purpose to compel a seemly observance of that day of the week celebrated as the Sabbath (Sunday) by the dominant Christian sect. See Colonial Laws of Mass. 132–33, 134; Mass. Bay Province Acts 1692–93, c. 22; 1716–17, c. 13; 1727–28, c. 5; 1760–61, c. 20. See also the codification of 1782, passed by the legislature assembled under the constitu-

tion of the Commonwealth of Massachusetts. Mass. Acts 1782, c. 23. These enactments were prior to the adoption of the Constitution of the United States and long before the adoption of the Fourteenth Amendment.

In enactments subsequent to the creation of the Federal Union, the Massachusetts legislature began to eliminate some provisions from the earlier prohibitory clauses of its Sunday laws. See Mass. Acts 1791, c. 58; R. S. 1836, c. 50.

In 1858 the legislature, apparently yielding to various pressure groups, commenced the practice of writing in various exceptions to the general prohibition against secular activities on the Lord's day, which has resulted in amendments by some seventy-old different enactments.[2]

The result of all this is that the Sunday law, as it now exists on the books, is an almost unbelievable hodge-podge. Chapter 136 of the Massachusetts General Laws, entitled "Observance of the Lord's day", contains in § 5 the general prohibition which defendant is threatening to apply to the plaintiffs: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of

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[2] Mass. Acts 1858, c. 151; 1881, c. 119; 1886, c. 82; 1887, c. 391; 1893, c. 41; 1895, c. 434; 1897, c. 389; 1900, c. 440; 1901, c. 80; 1902, c. 414; 1904, c. 460; 1906, c. 139; 1908, cc. 123, 126, 273, 333, 343, 354, 385, 537; 1909, cc. 420, 423; 1910, c. 327; 1911, c. 328; 1914, c. 757; 1916, c. 146; 1917, c. 207; 1918, c. 257; 1920, cc. 141, 240; 1922, c. 119; 1928, cc. 234, 406; 1929, c. 118; 1930, cc. 90, 143, 179; 1931, cc. 41, 71, 174, 176, 240, 275, 426; 1932, cc. 96, 105; 1933, cc. 150, 309; 1934, cc. 55, 63, 354; 1935, cc. 78, 104, 169; 1936, c. 129; 1937, c. 286; 1938, cc. 60, 143; 1943, c. 473; 1945, c. 575; 1946, cc. 207, 318; 1948, c. 119; 1949, c. 190; 1950, cc. 256, 322, 681; 1951, cc. 32, 564; 1954, cc. 132, 217; 1955, cc. 255, 304, 524, 742; 1956, cc. 11, 157, 212, 256.

necessity and charity, shall be punished by a fine of not more than fifty dollars." (There is no doubt that the "Lord's day as used in the statute means Sunday.) Then § 6 and the succeeding sections contain miscellaneous exceptions and qualifications, none of which do these plaintiffs any good. One of such exceptions might have seemed as an original matter to be applicable to the corporate plaintiff. It is provided in one part of § 6: "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby". But the Supreme Judicial Court has held, and of course that court's interpretation of the state statute is binding upon us, that this particular exception does not excuse the separate offense of keeping one's shop open on the Lord's day, although the defendant in conscience believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business on that day. *Commonwealth* v. *Has*, supra, 122 Mass. 40. To the same effect see *Commonwealth* v. *Kirshen*, 194 Mass. 151 (1907), *Commonwealth* v. *Starr*, 144 Mass. 359 (1887).

Much is made by the defendant of the following extract from the opinion of the Supreme Judicial Court in *Commonwealth* v. *Has*, supra, 122 Mass. at 42:

> "This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open

question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community."

This description of the Massachusetts Sunday law as being merely a "day-of-rest" statute, enacted pursuant to the police power, is answered by an examination of the statute, particularly those numerous provisions which permit various activities on Sunday, which certainly are not "works of necessity and charity", at specified hours and places designed not to affront godly persons worshipping in their churches during the usual morning hours. Moreover, the exceptions, permitting a great variety of

functions on Sunday, are not by § 6 made conditional upon the observance of some other day in the week as a day of rest. In fact there is on the statute books a wholly separate requirement, Mass. G. L. c. 149, § 48, imposing upon employers of labor the obligation to see to it that their employees are allowed "at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days." The characterization of the Sunday law as being merely a civil regulation providing for a "day of rest" seems to have been an *ad hoc* improvisation in *Commonwealth* v. *Has*, supra, because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state constitution if the religious motivation of the statute were more explicitly avowed. At any rate, that characterization of the statute is contradicted by other pronouncements of the Supreme Judicial Court both before and after the date of the decision in *Commonwealth* v. *Has*. See, for instance *Pearce* v. *Atwood*, 13 Mass. 324, 345-46 (1816); *Bennett* v. *Brooks*, 91 Mass. 118, 121 (1864); *Davis* v. *City of Somerville*, 128 Mass. 594, 596 (1880); *Commonwealth* v. *White*, 190 Mass. 578, 580-81 (1906). In the last-named case, blissfully ignoring what was said in *Commonwealth* v. *Has*, the Supreme Judicial Court said:

> "In construing this statute it is to be borne in mind that so far as material to the question before us, it is simply the continuation of a law which from a very early time in the history of the Colony has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper

observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance are set forth in the various preambles to those statutes. One of these is in the following language: 'Whereas it is the duty of all persons, upon the Lord's Day, carefully to apply themselves, publickly and privately, to religion and piety, the prophanation of the Lord's Day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons; therefore,' etc. See Prov. St. 1760-61, c. 20, § 1; 4 Prov. Laws, (State ed.) 415. Perhaps the most instructive preamble is that which precedes St. 1791, c. 58, which was the first general statute passed on this subject after the adoption of our State Constitution. It reads as follows: 'Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society; to the great disturbance of well disposed persons, and to the great damage of the community, by producing dissipation of manners and

immoralities of life: Be it therefore enacted,' etc. Such was the idea of the Lord's day for the observance of which this system was devised."

In fact, the joint brief filed by The Lord's Day League of New England and the Archdiocesan Council of Catholic Men "lets the cat out of the bag", so to speak, in the following statement: "Each organization has various aims and purposes, but have, in common, the purpose of preventing the further secularization and commercialization of the Lord's Day."

Fortunately, in passing upon the constitutionality of the state statute, we do not have to accept the characterization of it made in *Commonwealth* v. *Has*, supra. See *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955).

It seems to us that all the objections which have been taken under the Fourteenth Amendment to the constitutionality of the statute in question are well taken.

As to the freedom of religion provisions of the First Amendment which the Supreme Court has explicitly told us have been incorporated into the due process clause of the Fourteenth Amendment and have thus become binding on the states, see *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940); *Douglas* v. *City of Jeannette*, supra, 319 U.S. 157, 162 (1943); *Thomas* v. *Collins*, 323 U.S. 516 (1945).

We may start with the classic statement from *Everson* v. *Board of Education*, 330 U.S. 1, 15–16 (1947):

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force

nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States*, [98 U.S. 145 (1878)] at 164."

To the above may be added the statement by the Court in the *Everson* case (330 U.S. at 18):

"State power is no more to be used so as to handicap religions than it is to favor them."

What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group. It is clear that by denying to the plaintiffs the liberty to work, shop, or pursue other "secular" conduct on Sunday, the law puts an economic penalty upon a person observing as his Sabbath some other day than Sunday by depriving him of the

productive use of one further day of the week. In other words, whereas ordinary grocery stores are open six days a week, if the challenged law is constitutional the Crown Market can be open only five days, and none of these five days would include a day of the week end, when a large percentage of the week's sales is normally obtained. Even assuming that the Crown Market could stay in business on such a basis, it could do so only under great handicap as against other supermarkets. Crown Market's Orthodox customers also lose much of the value of their Sunday under the same penalty, since if the law is constitutional they may not shop on either Saturday or Sunday. Without doubt if they remain faithful to their religious convictions, they will be under a very substantial disadvantage as compared with shoppers whose Sabbath is observed on Sunday. The rabbi-plaintiffs would be hindered in their function of supervising the food to be eaten by the members of their congregations, and they would also suffer great detriment in their efforts to preserve, in these circumstances, due observance of the Jewish Sabbath and of the dietary laws by them.

For reasons closely related to those just set forth, the objection is well taken that, in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of liberty, without due process of law, contrary to the Fourteenth Amendment.

We think in addition that, on the decided cases, the discriminations apparent on the face of the statute con-

stitute a denial of the equal protection of the laws, forbidden as well by the Fourteenth Amendment. See *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *City of Springfield* v. *Smith*, 322 Mo. 1129, 19 S.W.2d 1 (1929); *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P.2d 141 (1938); *City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E.2d 52 (1938); *Ex parte Hodges*, 83 P.2d 201 (Okla. Cr. 1938); *Arrigo* v. *City of Lincoln*, 154 Neb. 537, 48 N.W.2d 643 (1951); *Henderson* v. *Antonacci*, 62 So.2d 5 (Fla. 1952).

Without elaborating the many discriminatory exceptions, two vices may be noted as examples: The statute does not generically forbid the keeping open of a store on Sunday to sell food, but it just limits this liberty to selected types of stores.[3] Employees of the favored stores are not less in need of rest than those of the Crown Market, nor does any reason appear why the operation of those stores is less calculated to disturb the rest of citizens than do the operations of the Crown Market. And many classes of work which are excepted are surely no

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[3] (1) Bakers and their employees may sell during specified hours any food customarily sold by them, and milk as well. (2) Persons who raise fruits and vegetables and their agents may sell the same and milk also on any property they own, during all hours on Sunday. (3) Licensed innholders and licensed common victualers may sell frozen desserts, frozen dessert mix, confectionery, soda water, milk and tobacco on Sunday, and during certain hours may sell bread. (4) Persons who sell fruit, frozen desserts, frozen dessert mix, confectionery and soda water "on secular days" and are especially licensed, may sell the same and milk all day Sunday, and during certain hours may sell bread. (5) Druggists may sell confectionery, soda water, frozen desserts, frozen dessert mix, milk and tobacco during all hours on Sunday. (6) News dealers whose stores are open every-other day of the week (thus excluding Sabbath-observing Jews) may sell milk and tobacco at all times on Sunday. (7) Shops operated and staffed by persons who because of conscientious beliefs duly observe Saturday as the Sabbath may sell kosher meat and milk *only until 10 A.M.*

less destructive of public rest and relaxation than the opening of the Crown Market would be.[4]

We ought to comment briefly on two Supreme Court cases much relied upon by the defendant.[5] In *Hennington* v. *Georgia*, 163 U.S. 299 (1896), the only claim considered by the Court was that, under the commerce clause, a state could not prohibit the running of a railroad train in interstate commerce on Sunday. The Court held simply that congressional silence could not foreclose the field to state regulation. The opinion as-

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[4] For instance, the persons operating the Crown Market (or the plaintiff customers) could dig ditches, or do any other type of labor, if that were their ordinary calling, and apparently could even vend food outside the store building. Moving such business indoors can not reasonably be thought to make it more disruptive of a day of rest and recreation.

Other provisions are equally whimsical: When Rosh Hashonah or Yom Kippur begins at sundown Sunday, fish, fruit and vegetables may be sold until 12 noon; but kosher meat may only be sold until 10 A.M. One may dig for clams on Sunday, but may not dredge for oysters. All professional sports are permitted (under certain conditions) from 1:30 to 6:30 P.M., and hockey, basketball and baseball may run much longer; but amateur sports are tolerated (under the same conditions) only between 2 and 6 P.M. Bowling alleys at amusement parks may open until 12 midnight, whereas other bowling alleys must close at 11 P.M.

[5] In another case, *Friedman* v. *New York*, 341 U.S. 907 (1951), the United States Supreme Court without opinion dismissed, for lack of a substantial federal question, an appeal from a decision by the New York Court of Appeals upholding a "Sunday law" of that state upon the ground that the statute simply provided in reasonable terms for a day of rest. *People* v. *Friedman*, 302 N.Y. 75, 96 N.E.2d 184 (1950). That case is clearly distinguishable from the one at bar; the statutes attacked are quite different. The New York law has few characteristics or roots in history tending to indicate that it is a religious regulation; and the New York courts have consistently interpreted it as a civil regulation, whereas the Massachusetts statute has most often been construed as a religious law. Nor does the New York statute contain such prolix and irrational exceptions to its prohibitions as those which dominate the Massachusetts statute before us. Perhaps this is why counsel supporting the statute in the present case have placed such slight reliance on the *Friedman* case.

sumed that the statute was for the purpose of securing a day of rest, as the Georgia Supreme Court had held, and reasoned from this premise (163 U.S. at 307). Also, it may be pointed out that this is a pretty old case, which was decided before the modern development of limitations upon the powers of the states implicit in the Fourteenth Amendment. In *Petit* v. *Minnesota*, 177 U.S. 164 (1900), the Supreme Court did affirm a conviction under a Minnesota statute prohibiting all labor on Sunday "excepting the works of necessity or charity." The statute contained the provision that keeping open a barber shop on Sunday "shall not be deemed a work of necessity or charity." The Court sustained the conviction of the defendant barber on alternate grounds: (1) That "necessity or charity" did not as a matter of fact include barber shops, so that the proviso really added nothing, and (2) even if barber shops might otherwise be excused from closing, it could not be said that the classification in the circumstances was unreasonable, since courts will take judicial notice of the fact that, in view of the custom of keeping barber shops open in the evening as well as in the day, the employees in them work more, and during later hours, than those engaged in most other occupations.

This opinion shall constitute the findings of fact and conclusions of law in accordance with Rule 52(a), F.R.C.P.

The form of our decree pursuant to the foregoing opinion will be settled by counsel upon due notice.

McCARTHY, District Judge, dissents from the opinion and judgment of the Court, and will file a dissenting memorandum at a later date.

APPENDIX B.

United States District Court

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action, No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,

Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, CHIEF ORTHODOX RABBI OF THE UNITED ORTHODOX CONGREGATIONS OF SPRINGFIELD AND PRESIDENT OF THE MASSACHUSETTS COUNCIL OF RABBIS, suing on behalf of himself and other Rabbis similarly situated,

Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS,

Defendant

Before

MAGRUDER and WOODBURY, *Circuit Judges*, and McCARTHY, *District Judge*

APPEARANCES: HERBERT E. EHRMANN, ESQ., SAMUEL MARKELL, ESQ., EDWARD L. LAVINE, ESQ., Goulston & Storrs; IRVING S. RIBICOFF, ESQ., DAVID KOTKIN, ESQ., Ribicoff and Kotkin; SAMUEL L. FEIN, ESQ., Fein, Cavanaugh & Kimball, *for Plaintiffs.*

S. THOMAS MARTINELLI, ESQ., *Assistant City Solicitor*, MATTHEW J. RYAN, JR., ESQ., *City Solicitor*, JOHN J. O'CONNOR, ESQ., *Assistant City Solicitor, for Defendant.*

JOSEPH H. ELCOCK, JR., ESQ., *Assistant Attorney General*, EDWARD A. McCORMACK, JR., ESQ., *Attorney General* for the Commonwealth of Massachusetts, LEO PFEFFER, ESQ., for the International Religious Liberty Association, HOWARD S. WHITESIDE, ESQ., for the Southern New England Conference of Seventh Day Adventists, HENRY M. LEEN, ESQ., for the Archdiocesan Council of Catholic Men, HERBERT S. AVERY, ESQ., for The Lord's Day League of New England,

Amici Curiae.

McCARTHY, D.J. (Dissenting) The plaintiffs here, a corporation and some individuals who are officers, stockholders or allegedly customers of the corporate plaintiff, and an Orthodox Jewish rabbi, sought by complaint to have a statutory three-judge court convene to determine the constitutionality of Section 5 of Chap-

ter 136 of the General Laws of the Commonwealth of Massachusetts. The defendant is the Chief of Police of the City of Springfield wherein the corporate plaintiff has its place of business. The court permitted one joint amicus curiae brief to be filed by intervening parties for each side of the question.

The plaintiffs filed a motion for a preliminary injunction which was never acted upon by the court. The defendant filed a motion to dismiss. As the record in this case will show, the hearing was devoted largely to arguments in the motion to dismiss. Some evidence was taken on the merits and various stipulations were filed with the court.

I am in complete disagreement with my colleagues on the court as to what constitute the facts in this case. The corporate plaintiff is managed by one Chernock, who is a director and the owner of 50% of its stock. In 1957 the Supreme Judicial Court of Massachusetts affirmed a judgment of conviction against Chernock on three complaints charging him with a violation of the precise section of the General Laws of Massachusetts, the constitutionality of which has been challenged in this proceeding. *Commonwealth* v. *Chernock* 336 Mass. 384. In the state proceedings the cases were submitted to the Supreme Court on an Agreed Statement of Facts which differs radically from what has been accepted by this Court as the basic facts in issue.

Paragraph 5 of the complaint alleges that the corporate plaintiff is . . . "selling food to Orthodox and Conservative Jewish persons, prepared in accordance with the tenets of their religion." Paragraph 11 of the complaint alleges that "Crown Market is a completely Kosher Supermarket". The foregoing allegations and other

language in the complaint would lead one to believe that the corporate plaintiff is engaged exclusively in the sale of Kosher meats and foodstuffs having a religious significance. In support of the allegations of the complaint, Chernock testified that he was the owner of 50% of the stock of the corporation and that approximately 95% of its sales were of Kosher foods. Chernock further testified that some foodstuffs were sold to non-Jewish customers on Sundays.

On the other hand in the case of *Commonwealth* v. *Chernock* (supra), the Massachusetts Supreme Judicial Court in its opinion stated as follows at page 385: "The cases were submitted on the following agreed facts. The defendant conducts a combination *Kosher* and *Super Market* which, because of its religious convictions is closed to business every Saturday and Jewish holiday but remains open to business on Sundays. On the days specified in the complaint, which were Sundays, the plaintiff kept his market open after 10:00 o'clock in the forenoon and until closing time and did sell *to the public* Kosher meats, *bakery goods*, *vegetables* and *canned goods of all types*." (emphasis added)

It is most disturbing to observe the discrepancies between the allegations of the complaint in this case and the agreed upon facts in the state court case. Quite obviously both cases are concerned with the same market and the same individual in the person of Chernock.[1]

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[1] The defendant's bill of exceptions in the state court cases establishes the identity of the defendant in that case with the plaintiff in the instant case. For example, the defendant therein filed a motion to dismiss which was captioned "Commonwealth v. Harold Chernock D/B/A Crown Market". The defendant's brief in that case under the heading "Issue No. 2" raised the same issues that are raised here, namely freedom of religion and equal

The inference from the language of the complaint is that the corporate plaintiff is engaged exclusively in the business of selling Kosher meat and Kosher food products — as witness the words "a completely Kosher market". On the other hand, the agreed statement of facts in the state court case make it clear that the market sells to the public all kinds of vegetables, groceries and bakery goods in addition to Kosher meats and Kosher foods — as witness the words "a combination Kosher and Supermarket." There are no limitations in the corporate plaintiff's charter, a certified copy of which I am annexing to this opinion, as to the character of foods it may sell. It would appear to me that in a case of this magnitude involving as it does the striking down of a state statute, there should be no doubt or confusion as to the facts. The court should know whether this market is a store for the sale of religious foods, if one may use that expression, or whether it is a super market selling all kinds of food to the general public. If it be the latter, as is indicated by the agreed statement in the state court case, then the fears expressed in the majority opinion that the religious rights of some persons are not being safeguarded may be laid at rest. In that event we need look no further to find the reason for the great volume of sales on Sundays.

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protection of the law under the Massachusetts Constitution and Declaration of Rights. The same defenses under the First and Fourteenth Amendments were available to the defendant in the state court case. After conviction in the Superior Court of Massachusetts (the trial court), a bill of complaint was brought in that court by the defendant for the purpose of restraining the authorities from enforcing the law pending the outcome of an appeal to the Supreme Judicial Court. It is noteworthy that the petitioner in that complaint is "Crown Kosher Super Market of Mass., Inc. alias Harold Chernock D B A Crown Market". Copies of these documents are being filed in the Clerk's office of the U.S. District Court at Boston.

which would appear to be the very obvious reason that the corporate plaintiff's competitors are closed on Sundays observing the general day of rest prescribed by the laws of Massachusetts. It is therefore my opinion that if the decision in this case is to turn in any degree on the factual situation, the interests of justice would best be served by reopening the case in this court for the purpose of taking testimony to establish the truth.

On the assumption that the alleged facts accepted by the court as to the nature and extent of the corporate plaintiff's business are of no significance, and on the further assumption that the sole issue before the court is whether or not the Commonwealth of Massachusetts may constitutionally enact a statute providing for the general closing of shops, warehouses and workhouses on Sunday, then I would allow the motion to dismiss on the basis that this Court will not and should not exercise its equitable powers to prevent enforcement of a state criminal statute where an adequate means to test the validity of the statute in the state court exists. *Spielman Motor Co. v. Dodge*, 295 U.S. 89. The complaint before the Court does not allege that irreparable harm will be suffered by the plaintiffs if this Court should refer the plaintiffs to their remedies in the state court and before the Supreme Court of the United States by way of certiorari.

The majority would exercise equitable power on the basis of the holding in *Evers* v. *Dwyer*, 358 U.S. 202, to the effect that a three-judge district court may not decline to take jurisdiction of a suit to enjoin operation of a state criminal statute where the enforcement of the statute results in the denial of civil rights of a citizen and the state officials intend to enforce the statute. Assuming, only for the moment, that enforcement of the state

statute in question could deprive one of the alleged plaintiffs of a civil right it is apparent from the stipulation of fact filed by the parties and from the majority opinion itself that the state court stands ready to enjoin enforcement of the statute pending adjudication and that the defendant stands ready to refrain from enforcing the statute pending adjudication.

The majority opinion further admits that this concerns only the corporate plaintiff for the individual plaintiffs, under existing Massachusetts law, cannot be charged with violation of this statute. The majority make a very tenuous argument that the only way that the individual plaintiffs may "vindicate the constitutional rights claimed is by obtaining equitable relief." The so-called constitutional right claimed by the individual plaintiffs is the asserted right to purchase food at any hour and this asserted right allegedly flows from the constitutional rights to liberty and to the free exercise of religion. In essence the sole complaint of the individual plaintiffs is that it is inconvenient to be unable to shop at all hours on Sunday. This was frankly admitted by counsel for the plaintiffs in argument. (Transcript p. 50, p. 61.) I believe that the individual plaintiffs are before the Court as "window dressing" to enable the corporate plaintiff to rely upon arguments that freedom of religion has been infringed and thereby help the corporate plaintiff to gain a commercial competitive advantage. For these reasons I would hold that none of the alleged plaintiffs has presented an infringement of a substantial right and that the requirements of *Ewers* v. *Dwyer*, supra, have not been met. I would relegate the plaintiff corporation and alleged plaintiffs to the state courts for their remedies.

Since the majority opinion goes to the merits of the

case I feel that I would be remiss in my duties if I did not state my views upon the merits.

There are two basic issues here presented:

1. Is the statute in question religious in nature?

2. If not religious in nature does the statute violate the equal protection clause of the Fourteenth Amendment?

McCollum and *Everson* make it clear that a statute which aids a religion or all religions or no religion or favors one religion over another is unconstitutional as a violation of the Fourteenth Amendment. Those cases both turn upon the question of the expenditure of public funds in aid of religion. On this point they are distinguishable. The cases do not declare unconstitutional a legislative enactment which recognizes the existence of a Supreme Being. The "high wall of separation" imported into those cases is fiscal in nature.[2]

Many examples of constitutional enactments recognizing the existence of a Supreme Being or of organized religion could be cited. A few are: the appointment of chaplains for the Armed Forces and for houses of legislature; the words "In God We Trust" upon currency; the inclusion of "under God" in the pledge of allegiance; draft exemptions for clergymen and conscientious objectors; tax exemptions for religious organizations.

The statute before the Court is not religious in nature in the sense of *McCollum* and *Everson*. It provides for no expenditure of public funds in furtherance of any or all religions.[3] It compels no religious observation nor does

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[2] See complete discussion of the source of this phrase in *Reynolds* v. *United States*, 98 U.S. 145, 162–164.

[3] See *Doremus* v. *Board*, 342 U.S. 429.

it interfere with any person's religious practices. In the absence of a definitive statement by the state court as to the meaning or federal constitutionality of the state statute, this Court would be bound to pass upon these questions if properly presented. *Doud* v. *Hodge*, 350 U.S. 485. The converse is also true. It is for the highest court of the state to tell us the meaning and application of a state statute. *Minnesota* v. *Probate Court*, 309 U.S. 270, 273; *United States* v. *Purnisom*, 339 U.S. 87, 89; *In re Murchison*, 349 U.S. 133, 135. This Court must give weight to the expression of the state court. In the instant case there have been many expressions of the meaning of the state statute by the Supreme Judicial Court. These expressions have also made clear the federal constitutionality of the state statute.

It is clear that the statute before the court had some religious intent in its initial form. The preambles to the early enactments make this fact obvious. In the majority opinion much is made of this circumstance. For my part the fact that a statute has religious roots is not disturbing at all. Many of our laws have religious roots which lie deep in the religious background and traditions of the American people.[1] Frankly, I can think of no better roots that a law might have. The statute, however, providing as it does for a day of rest and cessation from business activities is clearly within the police power of the

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[1] By Executive Order and Presidential Proclamation, Christmas is designated each year as a holiday. This day, commemorating as it does the birth of Christ, is celebrated as a day of rest and cessation from business. No day could have deeper or more significant religious roots, yet if the reasoning of the majority is carried to its logical conclusion, such Presidential Proclamation contravenes the Constitution in its application to all persons, including non-Christian inhabitants of the United States.

state and no apologies need be made for its history and origin.

The Supreme Judicial Court of Massachusetts had occasion to pass upon the question now before this Court in 1876, long before the inclusion of the First Amendment in the Fourteenth and long before the development of the line of cases exemplified by *McCollum* and *Everson*. In these circumstances it cannot be said that the Supreme Judicial Court was writing its way around constitutional prohibitions or that the police power theory is recent contrivance.

The legislative intent in this statute was stated in *Commonwealth* v. *Has*, 122 Mass. 40, 42, as follows: "This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusement of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled

to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because, as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community."

In *Commonwealth* v. *White*, 190 Mass. 584, the Supreme Judicial Court referred to the preambles to the early enactments of the statute which are sound in the day of rest purpose and in the religious observation purpose. This case does not hold that the statute is religious in purpose and intent. There the Court was concerned with what is "work of necessity" and determined that commercial cranberry picking was not a work of necessity within the meaning of the statute. The issue of religious freedom was not before the Court.

The language quoted above from *Commonwealth* v. *Has* has been recently affirmed in *Commonwealth* v. *Cherniack*, 336 Mass. 384.

A thorough study of the Constitution of the Commonwealth of Massachusetts and the construction placed upon it by its highest court furnishes convincing proof that this state is second to none in the safeguarding and preservation of the rights and privileges of all of its inhabitants. The Constitution of Massachusetts in Part I, Article II, guarantees to all the freedom of religion. Part I, Article III, provides among other things that "all religious sects and denominations . . . shall be equally under the protection of the law, and no subordination of any one sect or denomination to another shall ever be established by law." (Inserted in 1833 by the Eleventh Article of Amendment.)

Article XVIII of the Articles of Amendment, after re-

asserting the freedom of religion, prohibits the use of any public funds for "any church, religious denomination or society." (Inserted in 1917 by the Forty-Sixth Article of Amendment.)

These provisions of the Constitution of Massachusetts and many decisions of the Supreme Judicial Court indicate the scrupulous concern that the Commonwealth has for the rights, privileges and immunities of its inhabitants. In Volume 6 of the Opinions of the Attorney General, (1922) at page 483, is to be found the statement that the Constitution of Massachusetts "guarantees life, liberty and property, and equal protection to the same extent as does the Fourteenth Amendment."

It should not be inferred, however, that the Constitution of Massachusetts reflects any indifference towards religion and religious values. In its Preamble there is an acknowledgment by its framers of the "goodness of the great Legislator of the Universe", and a prayer for "His direction" in the establishment of the Constitution. Part I, Article II, declares that "it is the right as well as the duty of all men in society publicly and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the Universe." Part I, Article III, contains the following language ". . . the public worship of God and instructions in piety, religion and morality promote the happiness and prosperity of a people and the security of a republican goverment." In *Opinion of the Justices*, 214 Mass. 599, the Supreme Judicial Court said at page 601: "The Constitution of Massachusetts in several clauses inculcates the practice of religion and urges the public worship of God as essential means for the perpetuation of republican institutions. But in emphatic and unmistakable terms it

guarantees to all our people absolute freedom as to religious belief and liberty, unrestrained as to religious practices, subject only to the conditions that the public peace must not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated." That these guarantees exist for all, whether Christian or non-Christian, is settled beyond doubt by the decision of *Glaser* v. *Congregation Kehillath Israel*, 263 Mass. 435. In that case, at page 437, it was said: "These great guarantees of religious liberty and equality before the law of all religions are not confined to adherents of the Christian religion or to societies and corporations organized for the promotion of Christianity. They extend likewise to the adherents of the ancient religion whose sacred scriptures form a part of the Bible. We are of the opinion that Jews as well as Christians are protected by these explicit declarations of religious equality."

I have deemed it necessary to cite these provisions of the fundamental laws of Massachusetts and these few excerpts from the opinion of its highest court in view of the reference by the majority of this court to the decision of the *Commonwealth* v. *Has* as being an "ad hoc improvisation" and to other similar references to the interpretation placed by the Supreme Judicial Court upon the laws of the Commonwealth. The majority of this court has seen fit to label the Supreme Court's construction of the statute in the Has case as a "characterization" rather than as a construction of the law of Massachusetts.

I see nothing in the Constitution of Massachusetts, the decisions of its highest court, or the law now under attack, that warrants this court to challenge either the spirit of the law or the motives of that court. I perceive no

occasion here to go behind the construction of the law of a sovereign state, placed upon it by its own highest court, which would appear to me to be in a better position to interpret its own law than this court. If there be occasions for a federal court to question the motives of the highest court of a state in construing its own statutory law, this is not one of them.

The Supreme Court of the United States has had two occasions to pass upon and to uphold statutes against claims that they violated the establishment of religion clause of the First Amendment or the clause banning any statute which prohibited the free exercise of religion contained in the same amendment. These cases are illustrative of many similar decisions by the Supreme Court of the United States. I select them because of the applicability of their language and because I think that they should be contrasted with the authority of the majority.

In *Reynolds* v. *United States*, 98 U.S. 145, the Court was faced with a defense to the charge of polygamy based upon the religious beliefs of the defendant. At pages 162–167 the Court said: ". . . (T)he question is raised whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

"Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed

everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

"The word 'religion' is not defined in the Constitution. . . . The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

". . . Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

". . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

"So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

In *Zorach* v. *Clauson*, 343 U.S. 306, the Court was faced with a refinement of the "released time" program of McCollum in the sense that there was no expenditure of public funds to house the religious training classes or to oversee the children en route to the classes. In a six to three split the Court upheld the statute over objections that the statute violated the first and second clauses of the First Amendment. It was held that the state may

cooperate with and recognize the existence of organized religion. At page 313 it was said: "We are a religious people whose institutions presuppose a Supreme Being."

In differing conditions the Supreme Court of the United States has passed upon statutes requiring the cessation of either all or some business on Sunday. In 1885, in *Soon Hing* v. *Crowley*, 113 U.S. 703, the Court said, at page 710, "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observance, but from the right to protect all persons from the physical and moral debasement which comes from uninterrupted labors. Such laws have always been deemed beneficial and merciful laws especially to the poor and dependent, to the laborers in their factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States." In *Hennington* v. *Georgia*, 163 U.S. 299, in 1896, the Supreme Court set out the rule and the answer at pages 303-304. "The well settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. . . . It (the statute) is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the state, works of necessity

and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor."

The 1950 case of *People v. Friedman*, 302 N.Y. 75, upheld a similar statute against the same objections of interference with religious freedom. The Court of Appeals for the State of New York recognized that the Sunday laws were religious in origin but were maintained by the legislature for public health and safety purposes. On appeal to the Supreme Court of the United States a motion to dismiss was granted on the basis that no substantial federal question was presented. *Friedman et al v. New York*, 341 U.S. 907.

With regard to the comment in the footnote on *Friedman v. United States*, 341 U.S. 907, *People v. Friedman*, 302 N.Y. 77, the following is pertinent:

"The footnote asserts that the "New York statute has few characteristics or roots in history tending to indicate that it is a religious regulation". The fact is that *People v. Friedman*, at 96 N.E. 2d 186, asserts "that the so-called Sunday laws may be said to have a religious origin". The case goes on to say that even if the Sunday law to-day (i.e. in 1950) is penal in nature, Sunday is now set aside as a day of rest as wise and necessary to set apart for both the physical and moral welfare of a state or community.

With reference to this footnote, attention should be drawn to the preliminary report of the joint legislative committee on Sabbath Law, State of New York, Legislative Document (1952), No. 50, published by Williams Press, Inc., Albany, New York, in 1952. This legislative

document (at page 11) gives the chronology of New York laws both colonial and state. The first Sunday law from a New York colony was enacted in 1664 and was known as the "Duke of York's Laws". In 1685, the General Assembly passed the first New York Colonial statute on the subject — a bill against Sabbath breaking. Generally this Colonial statute forbade wordly labor, business, or work of ordinary callings, prohibited traveling and sports and any exercises except works of necessity or charity. In 1695 the Colonial Assembly enacted another act against profanation of the Lord's Day, prohibiting traveling, servile labor, and working, etc.

In 1778 an act for suppressing immorality was first passed in New York as a state. This act repeated almost verbatim the prohibitions of the 1695 law. During the next hundred years there are only a few minor changes.

Finally, in 1881 the Penal Code was adopted and the prohibitions against work, labor, business, and sports were arranged in separate sections. Aside from the section on public traffic on Sunday, and the section on public sports on Sunday, there were very few amendments to the Sabbath article from 1881 to 1952, a period of approximately seventy years.

Section 2140 of the New York Penal Code, entitled "The Sabbath", sounds the keynote of the Sabbath article in the following language: "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community".

How then, can the footnote state that the New York statute has few characteristics or roots in history tend-

ing to indicate that it is a religious regulation, when the legislature of the State of New York specifically designated it as regulating a religious day for a period of over approximately 170 years, and when the statute had colonial roots extending back for a further period of 114 years?

As to the statement that the Massachusetts statute is dominated by "prolix and irrational exceptions", with the intimation that the New York statute was not so characterized, it might be pertinent to point out that the Legislative Document No. 50 (1950) above referred to has as its "Preamble" the following statement from the annual message to the Legislature by Governor Thomas E. Dewey under date of January 9, 1952:

"The Penal Law provisions on Sabbath observations date back many years. The original broad provisions have been whittled away through the years by numerous exceptions and the present provisions create an illogical and inconsistent pattern. Although it is legal to conduct professional baseball, football, and soccer games on Sunday in many communities, it is illegal to conduct other sporting events and activities similar to those which are permitted. There are many other incongruities and examples of disparate treatment. Many activities which do not interfere with the religious repose of the community are prohibited by existing law. There is need for a careful re-examination of these provisions. I recommend that your honorable bodies establish a joint legislative committee to study the problems".

It is significant that the Governor of the State of New York clearly recognized that Sabbath Day regulations

was a matter for the Legislature, and he merely indicated that the law could be modernized to permit "activities which do not interfere with the religious repose of the community." To the intimation of the footnote on the Friedman case that the New York statute has few roots in history tending to indicate that it is a religious regulation, the true characteristics and roots of the statute may be found in expressions indicating a religious connotation from colonial laws in 1664 to the recommendation of the Governor of the State in 1952.

This brings us to the second issue, that of equal protection. With the religious issue disposed of, the possibility of violation of equal protection arises from the exceptions to the statute. So long as the exceptions are not unreasonable on their face we have no power to pass upon them. *Smith* v. *Cahoon*, 283 U.S. 553, 566-567. "The principle that the State has broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this Court (citing cases). But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action."

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

"2. A classification having some reasonable basis does not offend against that clause merely because it is not

made with mathematical nicety or because in practice it results in some inequality.

"3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79.

The Supreme Judicial Court of Massachusetts has adopted similar standards for determining the constitutionality of a legislative enactment and has used language particularly applicable here.

"The plaintiff contends that the statute imposes an arbitrary and unreasonable restriction upon its right to conduct its business, and deprives it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and of Articles 1 and 10 of the Declaration of Rights of the Constitution of Massachusetts and by the Fourteenth Amendment to the Constitution of the United States. And the right to engage in such a business or occupation carries with it the making of contracts, the advertising of goods, the solicitation of customers, and the adoption of the various means that are usually employed to encourage trade and to extend the market for goods. *Holcombe* v. *Creamer*, 231 Mass. 99, 108, 109. *Opinion of the Justices*, 271 Mass. 598, 601. *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105, 113. *New States Ice Co.* v. *Liebmann*, 285 U.S. 262, 278. But one cannot conduct his business or pursue his occupation in any way he may desire. He is subject to reasonable regulations designed to protect the

public interest. A reasonable regulation governing the sales of property does not deprive the owner of his property without due process of law. *Commonwealth* v. *Crane*, 162 Mass. 506. *Commonwealth* v. *Libbey*, 216 Mass. 356. *Nebbia* v. *New York*, 291 U.S. 502. *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176.

". . . The legislature possesses a large measure of discretion to determine what the public interest require and what means should be taken to protect those interests. The field for the legitimate exercise of the police power is coextensive with the changing needs of society. The record does not negative the existence of any of the possible findings that have been mentioned. All rational presumptions are in favor of the validity of an act of the legislative department of the government. *Perkins* v. *Westwood*, 226 Mass. 268. *Moore* v. *Election Commissioners of Cambridge*, 309 Mass. 303. *Morrissey* v. *State Ballot Law Commission*, 312 Mass. 121, 130.

"One assailing a statute on constitutional grounds has the burden of proving the absence of any conceivable grounds upon which the statute may be supported. 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.' *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 257–258. 'The burden is not sustained by making allegations which are merely the general conclusions of law or fact. . . . Facts relied upon to rebut the presumption of constitutionality must be specifically set forth.' *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185.

"The contention of the plaintiff that the statute imposes an arbitrary and unreasonable restriction upon its business cannot be sustained." *Merit Oil Co.* v. *Director, Necessaries of Life*, 319 Mass. 301, 302-306.

Testing the statute before the Court by each of the tests set out I believe that the answer must be in favor of the validity of the statute. Essentially the test is whether or not the exceptions are reasonable or are so arbitrary that this Court would be warranted in invading the province of the General Court of Massachusetts. Each of these exceptions was engrafted upon the statute at a different time and each was engrafted by vote of the legislature of Massachusetts. Careful analysis of the exceptions warrants the conclusion that each exception either allows the operation of a business which the General Court has determined is necessary or serves as an aid to the achievement of the rest and relaxation for which the legislature has set aside the day.

The late Chief Justice of the Supreme Court of the State of New Jersey, in an opinion upholding the state statute which banned the sale of automobiles on Sunday, said, "The State has an absolute right to enter here and force on all and everyone so engaged regulations for the benefit of the public, and it is not for the Court to say that its action in doing so is contrary to the constitutional provisions against discrimination merely because there are classes similarly situated with respect to the public or social evils requiring similar legislation that are yet unregulated . . ." *Gundaker Central Motors* v. *Gassert*, 23 N.J. 71, 127 A. 2d 566. An appeal to the Supreme Court of the United States was dismissed for failure to present a substantial federal question. 354 U.S. 933.

I would ordinarily say nothing further but I believe

that the opinion of the majority demands some comment by me. The factual statements of the majority opinion contain some unwarranted assumptions. They state that business considerations make operation of the corporate plaintiff's store on Saturday night impracticable. If the store closed at 10 p.m. on Saturday night an average of four hours business could be conducted for most months of the year. It should be borne in mind that it is alleged that the customers of the corporate plaintiff's store are not casual passers-by nor persons who treat it as a convenient corner grocery. It is the basis of the complaint that the customers inconvenience themselves to shop at the store. The corporate plaintiff would pay no more to have its employees work on Saturday night and Sunday morning than it already pays them to work all day Sunday. I do not agree that Saturday night and Sunday morning operation within the statute would be impracticable.

The majority of the Court also state that it is common knowledge that a grocery store's business is concentrated on Friday evening and Saturday. This contradicts the equally common knowledge that super-marketeering has changed the buying habits of the consumer and has tended to level out the volume of business of grocery stores. Based on a mis-assumption as to the buying habits of the consuming public the majority of the Court attribute the Sunday volume of the corporate plaintiff's store to the buying habits of Orthodox and Conservative Jews. This volume might as well be attributed to the fact that the corporate plaintiff's store is the only super market open on Sunday in the area. (Transcript p. 120). Further, the manager of the corporate plaintiff's store testified at hearing that Sunday business is "not exclusively with

Orthodox and Conservative Jews and that the store does not refuse to sell on Sunday to Gentiles. He said, "We don't discriminate. It would be bad business not to (sell to whoever came into the store)". It should also be added that examination of the day book of the corporate plaintiff, which was introduced in evidence, indicates that the corporate plaintiff's store, on Labor Day, did a volume of business which was greatly disproportionate to the business done on Mondays which were not holidays. This on a day after a Sunday on which they did their usual heavy business. The conclusion which I draw from this fact is that the store's Orthodox and Conservative customers either bought almost twice as much in this week as in other weeks or that the store was taking advantage of the fact that it was the only super market open on the holiday. The latter appeals more to reason than the former.[1]

It is stated in the majority opinion that "if the challenged law is constitutional the Crown Market can be open only five days". This statement is correct when the distinction is added that the corporate plaintiff may not lawfully do business on Sunday, except during the hours established by the legislature, according to the secular law of the state, and that the corporate plaintiff may not do business lawfully between sundown on Friday and sundown on Saturday according to the law of Orthodox Judaism, which law is not part of the jurisprudence controlling this Court. The point I wish to

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[1] The corporate plaintiff offered in evidence a record of its sales (Ex. 1). It is interesting to note that on Sunday, June 30, 1957, its gross sales were $3,583.61; on Wednesday, July 3, of the same year — $2,883.30, and on the following day, July 4, 1957, — $5,492.68. The religious convictions of some of the plaintiff's customers cannot explain this statistical data.

make is that under the law with which we must concern ourselves, if the statute is constitutional, the corporate plaintiff is lawfully prohibited from doing business on only one day of the week.

If the bald statement quoted above is correct what is to prevent an unscrupulous business man from forming or joining a religious body which observes as its Sabbath the day of the week on which his business is slowest? If, in the view of the majority, he closes his place of business on his Sabbath, then he has the constitutionally protected right to open his business, whatever it may be and wherever it may be located, on Sunday and do business with any and all customers. I do not think that this argument need be further expanded in order to demonstrate the logical fallacy inherent in the position taken by the majority.

The majority accuse the Supreme Judicial Court of Massachusetts of intellectual dishonesty in writing the *Has* case when they say that the decision was an "ad hoc improvisation", yet the majority blissfully ignore the very real distinction between the *Has* case and *Commonwealth* v. *White*, supra. However, the majority choose to describe the language of the *Has* case quoted above as "characterization" rather than as "construction" so that they could bring it under the rule of *Society for Savings* v. *Bowers*, 349 U.S. 143, 151, rather than the line of cases represented by *Minnesota* v. *Probate Court*, supra, *United States* v. *Burnison*, supra, and *In re Murchison*, supra, all of which hold that a construction as to the meaning of a state statute by the highest court of a state is binding upon the Federal Court.

The majority of the court in its opinion is highly critical of the exceptions in Section 6 of Chapter 136 of the Gen-

eral Laws of Massachusetts, to the blanket prohibition of Section 5 and refers to some of them either facetiously or as being the likely result of action by "pressure groups". I find nothing either in the record or in the law that warrants any such conclusions to be drawn. If there be anything in the legislative history of these exceptions which were enacted into law at various sessions of the Legislature and over a period of years that warrants such conclusions, it is unknown to me.[6] The granting of these exceptions by the Legislature appear to me to be matters of public policy peculiarly within the competence of the Massachusetts Legislature and well beyond the competence of this court. If I were to draw any conclusions

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[6] In the majority opinion it is stated that "the statute does not generically forbid the keeping open of a store on Sunday to sell food, but it just limits this liberty to selected types of stores. Employees of the favored stores are not less in need of rest than those of the Crown Market" etc. In a footnote relating to the subject matter the court has listed many of the exceptions which it characterizes as "whimsical", "prolix" and "irrational". In my judgment there is no warrant or justification for the phrase "favored stores" or for the harsh adjectives employed. What the Legislature has done is to give recognition to the nature of the day as a day of rest, leisure and relaxation by permitting the sale of some foods and beverages which are believed to be necessary or to contribute to the refreshment of that day. No markets are permitted to be open at any hours on Sunday except markets for the sale of Kosher meat and milk which may remain open until 10:00 A.M. All other markets are closed including the super markets and large general stores. The classification established by the Legislature quite obviously refers solely to the types of stores and the products they sell, and in no way to the race or religion of the proprietor or the employees.

In the absence of a legislative history of each enactment creating the various exceptions that appear in Section 6 of Chapter 136 of the General Laws, the mere listing of the exceptions is wholly without meaning. Those relating to sports will be found to be much the same as the laws of other states regulating the conduct of amateur and professional sports on Sundays. The provisions of the law which permits the digging of clams on Sunday but not the dredging for oysters is characterized in a footnote to the majority

from a study of these exceptions, I would say that they were undoubtedly granted for the purpose of accommodating the law to the needs of a developing society and that they were made for the purpose of contributing towards the refreshment of the people's participation in their day of rest. Some, perhaps, have been determined to be works of necessity under the present conditions of society. However that may be, they are legislative matters and matters of public policy affecting the people of Massachusetts and are not in any sense matters for this court to discuss and debate. In my view, it constitutes an unwarranted intrusion for a Federal Court to substi-

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opinion as being "whimsical". The fact is — and this is certainly common knowledge to the people of Massachusetts — that for generations, people residing along the seashore of the state have been digging clams for sport and for their own consumption when the tide is at a low ebb; whereas the dredging for oysters is a commercial enterprise involving the cultivation of oyster-beds, skillful dredging and other specialized activity. The distinction is not at all whimsical although it might appear to be so to the casual critic.

Further, the same footnote in the majority opinion states "Newsdealers whose stores are open every other day of the week (thus excluding Sabbath-observing Jews) may sell milk and tobacco at all times on Sunday". No such unreasonable interpretation has ever been placed on this section of the statute by any court. The statute obviously refers to regular newsdealers whose places of business are permitted by law to be open throughout the week and it certainly does not mean that if an individual newsdealer sees fit to close his doors on any particular day, he is thereby prohibited from opening on Sundays. Such an interpretation is lacking in logic and plain common sense. To suggest that Jewish newsdealers are prohibited from making the same sales on Sunday as their Christian competitors is not a correct statement.

The other exceptions in the statute could be similarly reconciled, but the foregoing will suffice to illustrate that the people of Massachusetts and their legislators have not busied themselves throughout the years with enacting laws that are whimsical, prolix or irrational. Least of all are the exceptions discriminatory.

tute its judgment on such matters for the judgment of the members of the Legislature who are elected by, and are directly responsible to the people of the Commonwealth of Massachusetts.

The history of the Lord's Day statute, which has been referred to as one of the "blue laws" of this Commonwealth by my colleagues, is one which dates back to the union of the states and is a part of the Golden Treasury of the kind of a civilization which every good citizen must try to perpetuate. It is not only a day of rest, but, quoting from the decision of *Commonwealth* v. *McCarthy*, 244 Mass. 484 at page 486:

> ". . . that the day could not be merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and response undisturbed by secular cares or amusements. Whatever inconvenience might result at the present day from the literal and general enforcement of the Lord's Day Act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute."

The courts of the United States, the courts of the States, and those who help to frame our laws and who help to chart our way of life must make certain that the line is held within the law against any person who would make the law nothing more than an instrument for destroying religion in the name of democracy. I believe that this should be the credo of all people regardless of their religious beliefs.

It must never be forgotten that ours is a government of laws predicated upon majority rule, and it must be remembered that when this day was set the States of the Union had each reserved to itself the right to enact statutes within the boundary lines of its constitution for the comfort, safety, and convenience of its people. The spirit of rest, comfort, and quietness of a Sunday in the lives of the people of Massachusetts, with the importance of having in mind other economic factors, and with the recognition of the value of the obligations and responsibilities of parents and the happy relationship of members of families associated with this day which not only has the aspects of rest, recreation and association, but also spiritual reflection. We cannot become prisoners of a false philosophy, which is truly dialectical materialism, and which in plain language represents the philosophy of Marx, Engel and Lenin, neither can we deny the right of others to disagree with our point of view. But is the person promoting this suit actuated by the spirit of the early founders of this great country, is he safeguarding the rights and privileges of our American society or is he using this as a medium by which to destroy these spiritual and economic values, the inevitable result of which might well be the complete destruction of our way of life? And if this were to happen, of what value would be our Constitution and laws, and our democratic way of life?

It is difficult to escape the conclusion that this is an example of an attempt to strike down the Constitution of Massachusetts and the Lord's Day as violative of rights under the First and Fourteenth Amendments of the United States Constitution on the basis of alleged religious belief, so that articles of every nature and description, kosher or non-kosher, could be sold. Examination

of some of the documents attached to the appendix, which represent a part of the opinion filed in the Clerk's Office, clearly shows this.[7]

I am directing the Clerk of the Court to file as an appendix to the original copy of the opinion, which will be a matter of public record, copies of the following documents: Certified copies of Complaints against Harold Chernock doing business under the name and style of the "Crown Kosher Market, Inc.", the Defendant's Bill of Exceptions in the same case, which was filed on September 6, 1956, together with a brief filed by the Commonwealth of Massachusetts with the signature of the then District Attorney of the County of Hampden Stephen A. Moynahan: the brief of the defendant Chernock so called, doing business under the name and style of the "Crown Kosher Market, Inc.", and an exemplified copy of a Bill in Equity with the request for a temporary restraining order filed in the Superior Court of the County of Hampden, with the caption for the plaintiff "Crown Kosher Super Market of Mass., Inc., alias Harold Chernock d/b/a Crown Market", with the attorney for the peti-

[7] Examination of the docket discloses that the appearance of the late Attorney General of the Commonwealth of Massachusetts was filed on July 23, 1958. While three amendments to the complaint which were filed during the summer of 1958 were assented to by attorneys for the Chief of Police of Springfield, they did not contain the name of the Attorney General although counsel for the plaintiff well knew notice had been given to the Attorney General under the statute. After the successor to the Attorney General had qualified the case was marked for hearing on October 30, several days before that the successor to the Attorney General requested a delay so that he might prepare and participate. At the hearing on November 3 the brief of the Commonwealth and a stipulation of fact were filed. The stipulation of fact does not agree with the evidence presented. No evidence was offered by the Attorney General's representative who was the only active counsel for the side adverse to the petitioner.

tioner in part the same as the one entered for the petitioner in the three judge court case; and a copy of the Certificate of Incorporation of the Crown Kosher Super Market of Massachusetts attested to by the Secretary of the Commonwealth. It may be said parenthetically also that while there was an interlocutory decree for a temporary restraining order granted, this was obtained through no hearing but upon consent of counsel of record in this particular case.

The so-called cash book offered by the complainant's counsel, available for examination and marked as an exhibit, is a very small ledger book which contains figures running only from June, 1957, down to November, 1958. I am co-relating this with the footnote #5 on page 24, which discloses the fact that this store was open on every day in the year with the exception of Saturdays, and other Jewish Holidays, Thanksgiving Day, including Labor Day of 1957 and 1958, and that on all these days where business had been suspended by others, very substantial amounts running into four figures were taken in.[8]

These facts speak for themselves, but a fair inference from all these entries discloses the fact that the business of this Crown Kosher Meat, Inc., alias Chernock, amounted to at least $600,000, and that about 40% of this business occurred on Sunday and on Mondays, particularly when a holiday was celebrated. They show figures of a very substantial nature on the 4th of July of 1957 and 1958. This is evidence of the commercial point of view in contra-distinction to the spiritual and patriotic background,

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[8] July 4, 1957, $5,492.68; September 1, Sunday, $4,179.58; September 2, Labor Day, $2,536.45; Christmas Day, $1,885.86; January 1, 1958, Wednesday, $2,233.66; July 4, 1958, $5,816.98; August 31, Sunday, $3,670.05; Monday, Labor Day, $2,173.52.

of a day dedicated to the courage and Americanism of our Founding Fathers, when there was truly a great heritage passed down to the people of the United States by a proclamation on that same day that a new nation was born in keeping with the written Declaration of Independence, and the Crown Kosher Meat Market so-called remained open.

In closing I feel constrained to say that the law sought to be invalidated here has been on the statute books of the Commonwealth of Massachusetts in substantially its present form since Massachusetts joined the Union. Until very recently there was scarcely a voice raised against what has become a traditional part of our way of life. Those who framed the Constitution of Massachusetts, and indeed those who framed the Constitution of the United States, saw nothing incompatible in the observation of the Lord's Day as a day of rest, and there is nothing in the Constitution of either the United States or Massachusetts that admits of any such strained interpretation as is sought here to the First and Fourteenth Amendments. The opinion of the majority of the court, if allowed to stand, will advance the cause of religious freedom and liberty not one iota. Its inevitable effect will be to disunite and divide the people of this Commonwealth, to dislocate our economic set-up, and to lay the foundation for the growth and development of cancer "isms", having in mind the economic values that are co-related with other statutes of the Commonwealth regulating hours of work and hours of labor and the rights and privileges of owners of many places of business engaged in many specialties, who do not seek to carry on their business activities on the Lord's Day. The law should be upheld.

I feel that I have discussed this matter sufficiently in the opinion, but I am disposed to re-emphasize the fact that ours is a government by the majority and that this majority should not be unreasonably unfair with the rights of the minorities who sincerely observe their religious beliefs. The good Jewish people, particularly those who are Orthodox Jews, faithfully observe Saturday as their Sabbath, which serves as a day of comfort and rest for them, and they representing the working class, as well as the Christians, because of the forty hour week law enjoy this Saturday and abstain from work the same day.

They are permitted under the present Lord's Day statute to purchase Kosher meats on Sunday. In all other respects the food they partake of outside of special holy days in the liturgy of Orthodoxy is the same as that used by Christians, but we cannot forget that if there is any interference with their religious observances these questions should be settled by the General Court of Massachusetts, which is in a position to recognize these minority rights which after all are but a small percentage of the population. In this particular matter before the Court these petitioners have been engaged in business since 1954, and an examination of their charter rights clearly indicates that they have the power to open warehouses on Sunday. It is clear that the Jewish people who passed down through the corridors of centuries the precious spiritual values which have served as a foundation stone of respect for God would not for one minute support any movement where under the cloak of religion a one-man corporation was using a spiritual garment as a medium by which unjustly to enrich himself.

I would dismiss the complaint, or refuse the injunction, and declare the statute constitutional in the circumstances.

I am respectfully reserving the right to file an additional memorandum if I find it necessary to discuss other matters which are a part of the history of this case.

APPENDIX C.

United States District Court

FOR THE DISTRICT OF MASSACHUSETTS

CROWN KOSHER SUPER MARKET OF MASS., INC., and IRVING HEAFITZ ET AL.

v.

GALLAGHER, Civil Action No. 58-471 M.

OPINION OF THE COURT.

ON PETITION FOR REHEARING.

JULY 20, 1959.

PER CURIAM. We have before us a paper wherein the Attorney General for the Commonwealth of Massachusetts comes "and moves that a new trial be granted in the above entitled matter". This may seem somewhat curious because, although an appearance was filed on behalf of the Governor and the Attorney General, the Attorney General has not appeared for the sole defendant, nor does he purport to act for him. We must assume, however, that in effect the Commonwealth intervened as a party defendant pursuant to its undoubted right to do so under 28 U.S.C. § 2284(2), and that the failure to file a formal petition for intervention was just an administrative omission. Thus we take it in the present movant's favor that he has standing to seek a new trial.

Ground 1 of the motion for a new trial is that: "The evidence submitted is insufficient as a matter of law to sustain findings of fact." Ground 2 reads: "The findings of fact made by the Court are inconsistent with such evidence as was submitted." These grounds are of course important if true. But it must be remembered that in an equity case the court is the trier of the facts. It is the court which must weigh the testimony and other evidence, observe the demeanor of the witnesses, and find the facts. It is abundantly clear that there is evidence to support the findings of fact, and the majority of the court are content to abide by those findings on the evidence submitted.

Ground No. 3 complains of the court's finding that most of the facts were stipulated by the parties, whereas the stipulation actually was limited to the tenets of the Orthodox Jewish faith and did not relate to particular facts affecting the petitioners. This asserted ground for a new trial is patently absurd, in the face of an examination of the stipulations of fact signed by the movant's attorney, especially the supplementary stipulation.

Ground No. 7, in which it is stated that the "evidence clearly shows that the meat was not washed on Sunday", is based upon a clear misstatement of the court's finding that "The inspector comes . . . on Sunday for the washing of *any* meat from animals slaughtered on the previous Thursday *which is on hand*." [Italics added.] In any event, this is a tempest in a teapot concerning a very minor matter.

The findings attacked by grounds numbered 4, 5, 6 and 8 are supported by substantial credible testimony, by the stipulations of fact, and by the exhibits, just as is the finding that 95 per cent of Crown Market's stock is kosher.

Ground No. 9 objects to the statement in the court's opinion that the plaintiff customers and plaintiff rabbis cannot, by any act of shopping at the corporate plaintiff's store or by inspecting it, violate the Sunday law. It was stipulated that the plaintiff customers were Orthodox Jews; the rabbis, needless to say, are orthodox. These persons are squarely exempted from the Sunday law by c. 136, § 6, even as construed in *Commonwealth* v. *Starr*, 144 Mass. 359 (1887).

Ground No. 10 objects that the judgment is invalid because the majority opinion interpreted the Massachusetts Sunday law in a manner contrary to the interpretation placed upon it by the state courts. The court was bound to accept as its premise the interpretations put upon the Sunday law by the Supreme Judicial Court, and it did so. In fact, at the oral argument before us we understood movant to contend that all the plaintiffs were within the exception contained in § 6; but the court was obliged to accept the contrary holding of the *Starr* case, supra. The majority did reject, which it had the right to do, the characterization of the statute in *Commonwealth* v. *Has*, 122 Mass. 40 (1877), as being merely a police measure designed to preserve a day of rest. We rejected that characterization as sporadic in the state decisions and unsound on the face of the statute. It is also to be noted that the Supreme Judicial Court has never had occasion to pass on the federal constitutional questions presented in this case.

Ground No. 11 objects that there is some inconsistency between the court's decree, which holds the statute unconstitutional merely as applied to the petitioners in this case, and the court's opinion, which states that the statute violates the Federal Constitution because it was

a statute respecting an establishment of religion. This objection is based upon a tortured reading of one phrase of the opinion torn out of context. It is apparent that the only question argued or considered was the alleged unconstitutionality of the statute as applied to these complaining persons.

It seems hardly necessary to answer the objection contained in ground 12 of the motion that the decree entered by this court "has the effect of preferring members of the orthodox Jewish faith to members of any other religious sect." This objection ignores, among other things, the fact that the court held that these plaintiffs were unconstitutionally discriminated against. We can only knock out that which we find to be unconstitutionally discriminatory; we cannot go further and legislate a wholly even balance between the competing interests.

Ground No. 14 objects that the decree purports "to restrain only a local police chief and does not extend to a State official", whereas under 28 U.S.C. § 2281 the power of a three-judge court is limited to restraining the action "of any officer of such State in the enforcement or execution of such statute." This objection is insubstantial in view of the answer and stipulation, both of which conceded that the defendant police chief did and would enforce the state law. *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D.Ala. 1956), aff'd 352 U.S. 903 (1956). Besides, this question is probably rendered moot by the Attorney General's intervention as a party defendant.

Grounds 13 and 15 may be discussed together. In ground 13 it is objected that "Additional evidence is available as indicated in the minority opinion to establish that the corporate plaintiff in the present proceeding was actually a party in State proceedings and therefore is

estopped to obtain the relief requested in the present proceeding." More generally, in ground 15 "the Attorney General seeks a new trial for purposes of clarifying and elucidating further the conflicting factual situation described in the minority opinion."

The State's titling of an indictment brought against "Harold Chernock d/b/a Crown Market" cannot be laid at the door either of Chernock or of the corporation. Further, the plaintiff Crown Market is certainly a corporation, whereas, as the answer admits, the state prosecution and conviction were solely of the individual Chernock. See also *Browder* v. *Gayle*, supra. The auxiliary civil action in the state courts never reached the merits before its dismissal as moot. Moreover, grounds 13 and 15 are both insufficient in failing to indicate what clarifying evidence could be introduced at a new trial, unless the only evidence is that described in the dissenting opinion. Assuming that it is so, the movant has wholly failed to demonstrate either that the failure to introduce such evidence was excusable or, more important, that any new evidence is available which would affect the result.

It may be that the case might have been presented to us differently if another had been in charge of defending it. But we must act on the evidence presented to us in an adversary proceeding, not on matters dehors the record found in an ex parte investigation. *Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316 (C.A. 3d, 1944), cert. denied 325 U.S. 867 (1945).

McCarthy, J., dissents from the denial of the motion for a new trial, and reserves the right to file a memorandum at a later date.

An order will be entered denying the motion for a new trial.

APPENDIX D.

United States District Court

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action, No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC., *Corporate Plaintiff*, ET AL

vs.

RAYMOND P. GALLAGHER, *Chief of Police of the City of Springfield, Massachusetts*

MEMORANDUM

JULY 23, 1959

McCARTHY, D.J. On July 20, 1959, an order was entered by Judge Magruder, concurred in by Judge Woodbury, denying the motion filed by the Attorney General of the Commonwealth of Massachusetts that a new trial be granted in the above-entitled matter. It is my considered judgment that the Attorney General of the Commonwealth of Massachusetts should have been accorded the opportunity to appear and argue orally the motion for a re-hearing filed by him in a case which indisputably contained so many complexing facts and circumstances. This procedure in the District Courts of the United States has always been recognized.

I disagree with the judicial determination of my distinguished colleagues both as to procedure and as to substance and I will file at a later date my memorandum fully expressing the reasons for my dissent.

APPENDIX E.

Massachusetts General Laws, Chapter 136, section 6, as appearing in Mass. General Laws (Tercentenary Edition, 1932) and as amended as follows; second and third paragraphs as so appearing amended, 1934, 328 § 7; fourth paragraph amended, 1932, 96; 1934, 354; paragraph added at end, 1933, 150 § 3; section revised, 1934, 373 § 6; second paragraph amended, 1955, 304; revised, 1957, 356 § 16; third paragraph amended, 1936, 129; 1937, 286; 1950, 256 § 1; fourth paragraph amended, 1938, 143; same paragraph revised, 1943, 473; 1950, 681; 1951, 504; 1954, 217; 1957, 356 § 17; last paragraph revised, 1946, 207 § 4; paragraph added at end, 1949, 190; 1950, 322.

SECTION 6. The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the

afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles of bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activi-

ties; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railways cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen deserts or frozen desert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and de-

livery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of Kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of Kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 592

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, FOSTER FURCOLO, GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS AND EDWARD J. McCORMACK, JR., ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

APPELLANTS,

v.

CROWN KOSHER SUPER MARKET OF MASS., INC.,
IRVING HEAFITZ,
MORRIS CHAITOVSKY,
RUTH B. COHEN, and
RABBI MOSES D. SHEINKOPF,

APPELLEES.

APPELLEES' MOTION TO AFFIRM THE JUDGMENT OR DISMISS THE APPEAL

GOULSTON & STORRS
50 Federal Street
Boston, Massachusetts
RIBICOFF AND KOTKIN
64 Pearl Street
Hartford, Connecticut
FEIN, CAVANAUGH & KIMBALL
1421 Main Street
Springfield, Massachusetts
Of Counsel

HERBERT B. EHRMANN
SAMUEL MARKELL
RAYA S. DREBEN
50 Federal Street
Boston 10, Massachusetts
IRVING S. RIBICOFF
DAVID KOTKIN
64 Pearl Street
Hartford, Connecticut
SAMUEL L. FEIN
1421 Main Street
Springfield, Massachusetts
Counsel for Appellees

Blanchard Printing Company, Boston, Mass. — Law Printers

INDEX

	Page
I. Motion to Affirm or Dismiss	1
II. Statement	2
III. Argument	3
Appendix "A"	
Portion of Stipulation Signed by Both Parties	13
Appendix "B"	
Certain Sections of Mass. G. L. c. 136 Not Quoted in Appellants' Jurisdictional Statement or Appended to it	14

TABLE OF CASES, STATUTES AND RULES

Cases

Binney v. *Long* 299 U. S. (1936)	9
Browder v. *Gayle* 142 F. Supp. 707 (M. D. Ala. 1956) Aff'd. 352 U. S. 903 (1956)	4, 5
Commercial Credit Corporation v. *United States* 175 F. 2d 905 (8th Cir. 1949)	11
Commonwealth v. *Chernock* 336 Mass. 384 (1957)	3; 5
Commonwealth v. *Dextra* 143 Mass. 28 (1886)	10
Commonwealth v. *Has* 122 Mass. 40 (1877)	10
Commonwealth v. *McCarthy* 244 Mass. 484 (1923)	10
Coppage v. *Kansas* 236 U. S. 1 (1915)	10
Everson v. *Board of Education* 330 U. S. 1 (1947)	8
Harrison v. *N.A.A.C.P.* 360 U. S. 167 (1959)	5
Hughes v. *Lawyers Trust Co.* 108 F. 2d. 792 (Sec. Cir. 1940), cert. denied, 310 U. S. 647 (1940)	11
McCollum v. *Board of Education* 333 U. S. 203 (1948)	8

Page

Morey v. *Doud* 354 U. S. 457 (1957) 9
Opinion of the Justices 300 Mass. 615 (1938) 9
Opinion of the Justices 337 Mass. 796 (1958) 9
Pierce v. *Society of Sisters* 268 U. S. 510 (1925) 9
Society for Savings v. *Bowers* 349 U. S. 143 (1955) 10
Spielman Motor Sales Company v. *Dodge* 295 U. S. 89 (1935) 4
Thomas v. *Collins* 323 U. S. 516 (1945) 8
West Virginia State Board of Education v. *Barnette* 319 U. S. 624 (1943) 8

Statutes and Rules

Mass. G. L. c. 149, s. 48 7
28 U.S.C. 2111 11
28 U.S.C. 2281 3
Supreme Court of the United States, Rule 15 11, 12
Supreme Court of the United States, Rule 16 1
Fed. R. Civ. P. 52 (a) 6

In the
Supreme Court of the United States

OCTOBER TERM, 1959

No. 532.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, FOSTER FURCOLO, GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS AND EDWARD J. McCORMACK, JR., ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

APPELLANTS,

v.

CROWN KOSHER SUPER MARKET OF MASS., INC.,
IRVING HEAFITZ,
MORRIS CHAITOVSKY,
RUTH B. COHEN, and
RABBI MOSES D. SHEINKOPF,

APPELLEES.

APPELLEES' MOTION TO AFFIRM THE JUDGMENT OR DISMISS THE APPEAL

I. Motion to Affirm or Dismiss

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellees move that the judgment and decree of the Court below be affirmed on the

ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. In the alternative, Appellees move that the appeal be dismissed because not taken in conformity with the Rules of this Court.

II. Statement

Appellants' statement of the case omits certain facts which Appellees believe may have a bearing on the disposition of their motion. Among these facts are the following:

a. Unless restrained in these proceedings Chief of Police Gallagher intends to enforce the provisions of Mass. G. L. c. 136 to the full extent of his authority (see Appendix A setting out the pertinent part of the stipulation of facts agreed to by the parties).

b. The Jurisdictional Statement quotes § 5 of Mass. G. L. c. 136 and in Appendix E sets out § 6 of said chapter. Additional provisions which may be pertinent are appended hereto as Appendix B, as they appear in Mass. G. L. (Ter. Ed. 1932) as amended, §§ 2, 3, 4, 4A, 7, 10, 11, 12, 14, 21, 22, 27.

c. The three named individual Plaintiffs are Orthodox Jewish customers of Crown Kosher Super Market suing on behalf of themselves and many others similarly situated as indicated by the list attached to the Complaint. Rabbi Moses D. Sheinkopf is an Orthodox rabbi suing on behalf of himself and all other rabbis similarly situated. (J.S. pp. 11, 66).

d. Certain other essential facts as found by the Court are set out in Appellees' argument hereinafter.

Appellants' statement of facts is erroneous in alleging at

the top of Page 5, "an equity proceeding in the State courts was also brought by the said Chernock to test the constitutionality of the statute in question but this suit was dismissed by the petitioner." No such equity proceedings were brought. There was an equity suit in the State court to restrain further criminal proceedings by Gallagher until such time as the then pending criminal case *Commonwealth* v. *Chernock*, 336 Mass. 384 (1957) could be decided. This is set out in the stipulation agreed to by the parties (See Appendix A).[1]

III. Argument

The present appeal, according to the Jurisdictional Statement, presents seven questions. The Appellees respectfully submit that in view of the findings of fact made by the District Court and the principles of law established by this Court, none of the questions presented is substantial within the meaning of the Rules of this Court and that Questions 6 and 7 have not been raised in conformity with the Rules of this Court.

A short discussion of each of the questions raised by Appellants indicates that Appellees' motion should be granted:

1. "Does a Three-Judge Court have jurisdiction to enjoin a municipal police official from enforcing a statute on the grounds that such statute is unconstitutional?"

28 USC § 2281 requires the convening of a Three

[1] See reference in Dissenting Opinion Footnote J.S. p. 33. The dissenting judge also annexed to his opinion an exemplified copy of this bill in equity. (J.S. p. 59) The document (not introduced in evidence) fully supports the stipulation.

Judge District Court where a state official is to be restrained in the enforcement of any state statute. While Police Chief Gallagher may be considered for some purposes a local officer, nevertheless, in enforcing Mass. G. L. c. 136, he was acting "in the interest of the State and not simply in the interest of the locality where he serves". *Spielman Motor Sales Company* v. *Dodge*, 295 U.S. 89, 94 (1935). "An official though localized by his geographic activities and the mode of his selection, is performing a State function when he enforces a statute which embodies a policy of state-wide concern." *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), and cases cited in Footnote 9 on page 713, aff'd 352 U.S. 903 (1956). Also see majority opinion on Petition for Rehearing, J.S. p. 67. Moreover, the intervention of the Attorney General in the instant case confirms the fact that Gallagher was performing a state function.

2. "Are the plaintiffs proper parties to raise the issues before the Court?"

At this time the Appellees feel that it is unnecessary to add to the discussion in the majority opinion on pp. 17, 14-15 of the Jurisdictional Statement showing that the Plaintiffs are proper parties.

3. "Should the Court have exercised its equitable jurisdiction?"

The present case is not one where comity requires a federal court to stay its decision pending state court determination of the meaning and application of a state statute. The Supreme Judicial Court of Massachusetts has already interpreted the statute and has found it applicable to Chernock, the manager of the corporate Plaintiff. That court overruled contentions that the Defendant's activities came within the statutory exception and that the act violated the Massa-

chusetts Constitution. Thus c. 136 was "exposed to state construction or limiting interpretation before the federal courts (were) asked to decide upon (its) constitutionality, so that federal judgment (is) based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court." *Harrison* v. *NAACP*, 360 U.S. 167, 178 (1959).

The only question undecided by the Supreme Judicial Court is one of Federal Constitutional law (not raised by the Defendant in *Commonwealth* v. *Chernock*) and this issue can no longer be avoided. As stated by the Court in *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) at page 713, Aff'd 352 U.S. 903 (1956), the doctrine whereby a federal court declines to exercise its jurisdiction "has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on State courts". Surely, this is particularly true where Federal questions alone are involved.

4. "Do the provisions of the Massachusetts General Laws Chapter 136 violate the rights, privileges or immunities of the plaintiffs under the Constitution of the United States in interfering with their freedom of religion, by depriving them of their liberty or property without due process of law or by denying them the equal protection of the laws?"[2]

In the instant case there are findings of fact in

[2] Appellants' question does not ask whether c. 136 is unconstitutional as a law respecting the establishment of religion, one of the grounds on which Appellees rested their case (see J.S. p. 5 and the Majority Opinion pp. 16-17 and the discussion beginning on p. 23 of the J.S.)

accordance with Rule 52 (a) F.R.C.P. (J.S. p. 28). On the findings of fact made by the Three Judge Court, a proper application of the law as established by this Supreme Court could admit of no conclusion other than that the enforcement of c. 136 against the Plaintiffs is unconstitutional. Among these basic findings of fact rendering such a conclusion imperative are the following:

a. The officers, stockholders, and directors of the corporate Plaintiff are Orthodox Jews who observe the Jewish Sabbath from sundown Friday to sundown Saturday and do not operate their store during such period. (J.S. p. 12). While the corporate Plaintiff's super market offers for sale all categories of food, only kosher meats and meat products are carried and 95% of the rest of its stock is kosher. (J.S. p. 11.) Note that the Jurisdictional Statement, p. 4, is misleading in suggesting that the market sells "all types of meats and groceries."

b. The large majority of Crown Market's customers, because of religious beliefs, may not shop on their Sabbath. (J.S. p. 12) The individual Plaintiffs, as was stipulated by the parties, may not shop on Saturday.

c. If the Crown Market were compelled to close on Sunday, it would operate under a great handicap as against other markets open six days a week if it could afford to remain in business at all. (J.S. p. 25)

d. Crown Market's Orthodox customers (including Plaintiffs in this suit) would be, under a very substantial disadvantage, if they remain faithful to their religious convictions, as compared with shoppers whose Sabbath is observed on Sunday.

If the corporate Plaintiff is closed on Sunday, the Rabbi Plaintiffs would be hindered in their function of servicing food and suffer great detriment in their efforts to preserve due observance of the Jewish Sabbath and Jewish dietary laws. (J.S. p. 25)

e. Chapter 136, therefore, denies the Plaintiffs the liberty to work, shop or pursue other "secular conduct" on Sunday (J.S. p. 24) and puts an economic penalty upon the Plaintiffs and others observing as their Sabbath some other day than Sunday (J.S. pp. 24-25).

It furnishes special protection to the dominant Christian sects which celebrate Sunday as the Lord's Day without furnishing such protection to those Christian sects and Orthodox and Conservative Jews who observe Saturday as the Sabbath. (J.S. p. 24)

f. The description of c. 136 as merely a "day of rest" statute cannot be accepted. (J.S. p. 20)

1. Massachusetts already has a wholly separate law requiring employers to allow their employees at least twenty-four consecutive hours of rest in every seven consecutive days. (Mass. G. L. c. 149, §48)
2. The exceptions in c. 136 which permit various activities on Sunday are at variance with such a description of the Lord's Day statute and in themselves indicate that the primary purpose of the act was to establish a religious Sabbath. (See Appendix E to Jurisdictional Statement and Appendix B to this motion.)
3. The exceptions set out in c. 136 are con-

tained in some 70-odd enactments (J.S. pp. 18, 19) and form an almost unbelievable hodge-podge (J.S. p. 18) and, for the most part, are not conditional on the cessation of labor on some other day of the week (J.S. p. 21)

4. The exceptions discriminate arbitrarily, without rational basis against the Plaintiffs so as to deprive them of equal protection of the laws (J.S. p. 26)

Upon the foregoing facts, the Three Judge Court, in following principles established by this Court, could come to no conclusion other than that c. 136 is a law respecting the establishment of religion and an interference with the free exercise of religion and a violation of the first amendment as incorporated by the fourteenth amendment. *Everson* v. *Board of Education*, 330 U.S. 1, 14-16, (1947); *McCollum* v. *Board of Education*, 333 U.S. 203, 213 (1948)

Even if the decree appealed from were not buttressed by numerous findings of fact indicating that c. 136 was primarily for the purpose of setting up a religious Sabbath, the act would still be unconstitutional as applied to the Appellees in this case. If we assume, contrary to the findings, that c. 136 merely establishes a "day of rest", the application of the act against these Appellees, who already rest on their own Sabbath, would place them under severe pressure to abandon the tenets of their faith and to conform to the practice of another religion. This pressure would be applied by the state through the criminal law. To validate such an invasion of rights guaranteed by the first amendment, there must be a grave and immediate danger to the interests of the state, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

To compel people who already observe another day of rest, to "rest" on Sunday also hardly seems to fulfill an urgent public need. Especially does the justification seem weak when the criminal statute to accomplish this result is shot through with numerous exceptions, even as to hours on Sunday, to permit businesses and persons to operate on seven days a week. In those cases in which an infringement of first amendment liberties has been held justified, there was a very serious danger to public health or morals, such as a small pox epidemic or the practice of polygamy. Here, the provisions of the act itself discredit the claim of any public necessity for its application against the Plaintiffs.

Upon the foregoing findings of fact also, the Three Judge Court could come to no conclusion other than that the discriminations in c. 136 were arbitrary, without rational foundation and, under principles established by this Court, constituted a violation of the due process clause of the fourteenth amendment and a denial to the Plaintiffs of the equal protection of the laws. *Morey* v. *Doud*, 354 U.S. 457, 466 (1957), *Binney* v. *Long*, 299 U.S. 280, 294, (1936), *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535, (1925), *Opinion of the Justices*, 300 Mass. 615, 617 (1938); *Opinion of the Justices*, 337 Mass. 796 (1958).

5. Has the Three Judge Court correctly applied the Massachusetts statute as interpreted by the Supreme Judicial Court of the Commonwealth?

In no respect did the Three Judge Court depart from the decisions of the Massachusetts Court construing the meaning of c. 136, § 5 and § 6 thereof. It even accepted the State Court's construction of § 6 that the words "secular business and labor" do not include keeping open a shop (J.S. p. 19). Probably this

question raised by the Appellants refers to the finding by the Three Judge Court that c. 136 sets up Sunday as a religious Sabbath and not merely as a "day of rest". This finding involved no interpretation of the meaning of the statute. The Court correctly applied the Statute as it was interpreted by the Massachusetts court. The Three Judge Court, however, was not bound by any characterization of the statute by the State Court. If it were so bound, the federal courts could be deprived of jurisdiction to examine the actual effect of a State law whenever a state court merely asserted that it had a different purpose, *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955), *Coppage* v. *Kansas*, 236 U.S. 1, 15-16 (1915).

Moreover, the Three Judge Court actually did follow the characterization of the Lord's Day Statute as establishing a religious Sabbath expressed in a long line of Massachusetts decisions. These cases were decided before and after *Commonwealth* v. *Has*, 122 Mass. 40 (1877) which was the first case to hold that the act set up merely a day of rest. (See discussion in Majority Opinion, J.S. pp. 21-23 and cases cited on p. 21, also *Commonwealth* v. *Dextra*, 143 Mass. 28, 31, (1886), *Commonwealth* v. *McCarthy*, 244 Mass. 484, 486, (1923)).

6. Is the evidence submitted to the Court sufficient as a matter of law to sustain the findings and decree?

The Jurisdictional Statement does not specify what findings the Appellants claim to be plainly wrong or in what respect any evidence is insufficient to support them. Without some such specification, this Court, in determining whether briefs and further arguments are necessary, would have to read the entire transcript and make its own selection of the findings of fact as

to which the Appellants believe the evidence to be insufficient. Question No. 6, therefore, on its face, presents no particular matter so substantial as to require further argument. In this respect also Appellants' appeal does not conform with the Rules of this Court because it is not a short and concise statement of the question presented by the appeal expressed in the terms and circumstances of the case as required by Rule 15 of the Revised Rules.

7. "Is the decree entered by the Court consistent with the findings of fact?"

Rule 15 requires that the Jurisdictional Statement contain, if the appeal is from a federal court, "a copy of such order, judgment or decree, which may, however, be limited to the portions thereof appealed from". In view of the failure of the Appellants to present this Court with a copy of the judgment, it is not clear exactly what the Appellants' mean by the word, "consistent." (For instance, the Jurisdictional Statement on page 5 suggests that the opinion concluded that § 5 alone of c. 136 was unconstitutional. However, the declaratory judgment part of the decree referred to c. 136 without specifying § 5 and the opinion also dealt with the entire act.)

It may be, that on the findings of fact, the Court could have entered a permanent injunction broader in scope than was actually entered. However, this would not provide the Appellants with ground for reversal since they were not prejudiced by such action. 28 U.S.C. 2111, *Commercial Credit Corporation* v. *United States*, 175 F.2d 905, 908 (8th Cir. 1949), *Hughes* v. *Lawyers Trust Co.*, 108 F.2d 792 (2nd Cir. 1940) cert. denied, 310 U.S. 647 (1940).

For the foregoing reasons, the Appellees ask that their motion to affirm the judgment be allowed.

The Appellees further ask that their motion to dismiss the appeal be allowed as not within the jurisdiction of this Court, because not taken in conformity to the Rules of this Court in the following respects:

a. Question No. 6 of the Jurisdictional Statement presents no concise statement of facts material to the consideration of the question as required by Rule 15.

b. No copy of the Decree appealed from is appended to the Jurisdictional Statement as required by Rule 15.

Respectfully submitted,

HERBERT B. EHRMANN
SAMUEL MARKELL
RAYA S. DREBEN
50 Federal Street
Boston 10, Massachusetts
IRVING S. RIBICOFF
DAVID KOTKIN
64 Pearl Street
Hartford, Connecticut
SAMUEL L. FEIN
1421 Main Street
Springfield, Massachusetts
Counsel for Appellees

GOULSTON & STORRS
50 Federal Street
Boston, Massachusetts
RIBICOFF AND KOTKIN
64 Pearl Street
Hartford, Connecticut
FEIN, CAVANAUGH & KIMBALL
1421 Main Street
Springfield, Massachusetts
Of Counsel

Appendix A

PART OF STIPULATION AS TO FACTS AGREED TO BY THE PARTIES
(Filed November 13, 1948)

The parties to the above-entitled suit hereby stipulate as follows:

I. Unless restrained in these proceedings, the defendant will enforce the provisions of Mass. G. L. (Ter. Ed.) c. 136 to the full extent of his authority.

II. There is no case now pending in the state courts of Massachusetts against the corporate Plaintiff or its Manager, Harold Chernock, involving the enforcement of Mass. G. L. (Ter. Ed.) c. 136 or by either of them to stay proceedings under said Act.

The corporate Plaintiff's Manager, Harold Chernock, was convicted by the District Court of Springfield for keeping open a shop on Sunday in violation of G. L. c. 136 at the address of the corporate Plaintiff, the said Chernock appealed to the Superior Court for Hampden County and was convicted after trial. Thereafter, the said Chernock took his exceptions to the Supreme Judicial Court of Massachusetts. These exceptions were subsequently overruled in an opinion, *Com.* v. *Chernock*, Mass. A.S. 1057 on November 13, 1957.

After the proceedings in the District Court of Springfield, the corporate Plaintiff filed a bill in equity in the Superior Court of Hampden County to restrain Raymond P. Gallagher, Chief of Police of the City of Springfield, from serving further complaints upon the petitioner until such time as the case of *Com.* v. *Chernock* had been decided. The court issued such a preliminary injunction. Following the decision in *Com.* v. *Chernock*, a final decree was entered dismissing the bill in equity.

* * *

Appendix B

Certain Sections of Massachusetts General Laws, Chapter 136[3] not quoted in Appellants' Jurisdictional Statement or Appended to it.

(Tercentenary Edition, 1932 as amended)

Section 2. Being Present at or Taking Part in Certain Entertainments on Lord's Day Penalized; Exceptions.

Whoever on the Lord's day is present at a game, sport, play or public diversion, except a concert of sacred music, a public entertainment duly licensed as provided in section four or a free open air concert given by a town, or by license of the mayor or the selectmen, upon a common or public park, street or square, or except a game of golf conducted on an open air golf course, or except a game of tennis or dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing, or except after one o'clock post-meridian a game of outdoor lawn bowling or the playing of golf or driving on an outdoor golf driving range or playing on a miniature golf course, so called, shall be punished by a fine of not more than five dollars. Whoever on the Lord's day takes part in any game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not more than fifty dollars. This and the following section shall not apply to amusement enterprises lawfully conducted under section four A or four B or to sports or games conducted in accordance with sections twenty-one to twenty-five, inclusive, in any city or town which accepts said sections or in accordance with sections twenty-six to thirty two, inclusive, in any city or town in which said sections

[3] The Act is entitled, "Observance of the Lord's Day".

twenty-six to thirty-two are then in force. (1760-1, 20, S9; 1782, 23, S81, 7; 1791, 58, S81, 5; 1796, 89, S1; RS50, S5; 1858, 151; GS84, S4; PS98, S1; 1887, 391, S1; 1895, 434, S81, 4; RL 98, S81, 2, 5; 1904, 460, SS 1-3; 1908, 385, S1; 1918, 257, SS336, 338; 1919, 5; 1920, 2; 1929, 249; 1928, 406, S1; 1931, 275; 1931, 426, S243; 1933, 150, S1; 1934, 63; 1935, 78; 1946, 207, S1; 1955, 255, S1; 1956, 11, appvd. Jan. 23, 1956; effective 90 days thereafter; 1956, 212, appvd. March 19, 1956; effective 90 days thereafter; 1956, 256, appvd. April 10, 1956; effective 90 days thereafter.)

Section 3. Maintaining Certain Public Exhibitions Prohibited.

Whoever offers to view, sets up, establishes, maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining any public entertainment on the Lord's day, except as provided in section two, unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four, or whoever on the Lord's day acts as proprietor, manager or person in charge of a game, sport, play or public diversion, except a public entertainment licensed under section four and except as provided in section two, shall be punished by a fine of not more than five hundred dollars. (CL 133, SS 1, 2; 1692-3, 22, S 1; 1716-7, 13, S 1; 1727-8, 5, S1; 1760-1, 20, S82, 9; 1782, 23, S81, 7; 1791, 58, S81, 5; 1796, 89, S1; RS 50, S81, 5; GS 84, S81, 4, 9; 1862, 152; 1863, 143; PS 98, S81, 2; 1887, 391; 1895, 434, S81, 2, 4; RL 98, S81, 2, 5; 1904, 460, S81-3; 1908, 385, S1; 1918, 257, SS336, 338; 1919, 5; 1920, 2; 1955, 255, S2.)

Section 4. Certain Public Entertainments May Be Licensed; Revocation.

Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, including musical entertainment provided by mechanical or electrical means, in keeping with the character of the day and not inconsistent with its due observance, whether or not admission is to be obtained upon payment of money or other valuable consideration, and, if the proposed entertainment described in the application is solely for the exhibition of motion pictures, for the benefit of patrons in a public dining room or for the use of television, the use of radio, or musical entertainment provided by mechanical or electrical means, the mayor or selectmen may grant an annual license therefor; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. The application for the approval of the proposed entertainment by the commissioner shall be accompanied by a fee of two dollars, or, in the case of an application for the approval of an annual license, as herein provided, by a fee of fifty dollars. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. The foregoing provisions, insofar as they authorize any person to refuse to grant, or

to suspend, revoke or annul a license upon the ground that the proposed entertainment is not in keeping with the character of the Lord's day or not consistent with its due observance, and insofar as they require written approval of the proposed entertainment by said commissioner, shall not apply to any person making an application for a license to exhibit motion pictures or for the use of radio or television on said day, nor to any license issued upon such application. (1908, 385, S1; 1909, 189; 1926, 326; 1945, 575; 1953, 596; 1954, 303; 1955, 742, appvd. and effective on Sept. 9, 1955; 1956, 157, appvd. March 6, 1956; effective 90 days thereafter. Amended by 1957, 300, apprv'd April 22, 1957; effective 90 days thereafter.)

Section 4A. Exceptions of Amusement Parks and Beaches. The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe, may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely:— Bowling alleys, shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre, photographic galleries or studios in which pictures are made and sold, games, and such amusement devices as may lawfully be operated therein on secular days; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed enterprise shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner

of public safety as provided in the case of public entertainments under section four. Any licensee hereunder may distribute premiums or prizes in connection with any game or device lawfully maintained and operated by him under authority hereof. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. So much of this section as relates to the maintenance and operation of bowling alleys shall not apply in any city or town which shall have accepted the provisions of section four B. (1933, 150; 1933, 309, S1; 1946, 209, S2.)

Section 7. Sale of Certain Articles on Lord's Day Licensed.

In Boston, and in any other city or town which accepts this and section eight or has accepted corresponding provisions of earlier laws, in a city by its city council or in a town by the voters of the town at an annual town meeting, the licensing board or officer in such city or town, or if there is no such board or officer the aldermen of a city, or if there are no aldermen the city council, with the approval of the mayor, or the selectmen of a town, may grant, to any reputable person who on secular days is a retail dealer in frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit and who does not hold a license for the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, a license to keep open his place of business on the Lord's day for the sale of frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit. (Amended by 1957, 356, S18, appvd. May 13, 1957; effective 90 days thereafter.)

Section 10. Certain Parades with Music Allowed on Lord's Day.

Any post or camp of an incorporated organization of veterans of any war in which the United States has engaged, or any incorporated civic or fraternal organization, may parade with music on the Lord's day for the purpose of attending divine service, holding commemorative exercises or dedicating memorials; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held. (1908, 354; 537; 1920, 141; 1922, 119; 1930, 90; 1931, 176.)

Section 11. Policemen or Firemen May Parade with Music on Certain Sundays.

Any company or association of policemen or firemen, whether in active service or former members of a police or fire department, may parade with music, in the case of policemen, on policemen's memorial day, the first Sunday of June in each year, and, in the case of firemen, on firemen's memorial day, the second Sunday of June in each year, for the special purpose of decorating the graves of deceased policemen or firemen, as the case may be; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held. (1906, 139; 1931, 41, S1.)

Section 12. Persons Keeping Places of Entertainment, etc., to Entertain Only Travelers, etc.

Whoever, keeping a house, shop, cellar or place of public entertainment or refreshment, entertains therein on the Lord's day any persons other than travelers, strangers or lodgers, or suffers such persons on said day to remain therein or in the yards, orchards or fields appertaining thereto, drinking or spending their

time idly or at play, or in doing any secular business, shall for a first offence be punished by a fine of not more than fifty dollars for each person so entertained or suffered so to remain; and for a subsequent offence by a fine of not more than one hundred dollars; and if convicted three times, he shall thereafter be disqualified to hold a license. (1692-3, 22, S3; 1698, 10, S4; 1727-8, 5, S3; 1760-1, 20, S4; 1782, 23, SS4, 7; 1791, 58, S3; 1796, 89, S1; 1832, 166, S5; RS 47, S13; 50 S3; 1837, 242, S1; 1844, 160; GS 84, S3; 1864, 79; PS 98, S4; RL 98, S6.)

Section 14. Penalty for Rude Behavior.

Whoever on the Lord's day behaves rudely or indecently in any house of public worship shall be punished by a fine of not more than ten dollars. (1782, 23, S9; 1791, 58, S7; RS 50, S8; GS 84, S7; PS 98, S7; RL 98, S9.)

Section 21. Certain Sports and Games Permitted.

In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council, or in any town which accepts said sections by vote of its inhabitants, it shall be lawful on the Lord's day to take part in or witness any athletic outdoor sport or game, as hereinafter provided between the hours of one thirty and six thirty post meridian and, in the case of a base-ball game commenced before the hour of six thirty post meridian, for such further time beyond said hour as may be necessary to complete said game; provided that said game had been scheduled to commence at or before the hour of three post meridian, or is the second of two successive games to be played on the same day, the first of which had been scheduled to commence at or before the hour of two post meridian. In any such city or town it shall be lawful on the Lord's day to

take part in or witness, as hereinafter provided, any indoor hockey or basketball game between the hours of one thirty post meridian and twelve midnight. (1920, 240, S81; 7; GL 136, S26; 1928, 406, S2; 1931, 174; 1935, 104; 169; 1948, 119; 1951, 32; 1954, 132.)

Section 22. To Be Held Only on Licensed Places.

Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship. (1920, 240, S2; 1928, 406, S2.)

Section 27. Licensing Such Sports, etc., on Designated Playgrounds, etc.

Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship. (1928, 406, S2; 1931, 426, S244.)

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Supreme Court of the United States

OCTOBER TERM, 1959. No. 11

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, FOSTER FURCOLO, Governor of the Commonwealth of Massachusetts, and EDWARD J. McCORMACK, JR., Attorney General of the Commonwealth of Massachusetts,

Appellants,

vs.

CROWN KOSHER SUPER MARKET OF MASS., INC., IRVING HEAFITZ, MORRIS CHAITOVSKY, RUTH B. COHEN and RABBI MOSES D. SHEINKOPF,

Appellees.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM THE JUDGMENT OR DISMISS THE APPEAL.

EDWARD J. McCORMACK, JR.,
Attorney General,
State House, Boston

JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,
State House, Boston

JOHN WARREN McGARRY,
Assistant Attorney General,
State House, Boston

S. THOMAS MARTINELLI,
City Solicitor,
City Hall, Springfield

INDEX

I.	Reference to Reports of Opinions	1, 2
II.	Statement of Jurisdictional Grounds	2, 3
III.	Statutory Provisions	3, 9
IV.	Questions Presented	3, 4
V.	Statement of the Case	4, 5
VI.	Argument	6, 7, 8
VII.	Conclusion	8
Appendix "A"		9, 10, 11, 12, 13

TABLE OF CASES, STATUTES AND RULES

Cases

Commonwealth v. *Chernock*, 336 Mass. 384 (1957) 4

Friedman v. *N. Y.*, 341 U.S. 907 6

Friedman v. *N. Y.*, 302 N.Y. 75 6

Radio Corp. of America v. *United States*, 71 S. Ct. 806, 341 U.S. 412, 95 L. Ed. 1062 6

U. S. v. *Ellicott*, 32 S. Ct. 334, 223 U. S. 524, 56 L. Ed. 535 2

Statutes and Rules

Mass. G.L. c. 136 § 5 2, 3, 4, 5

Mass. G.L. c. 136 § 6 3, 4, 9–13

28 U.S.C. § 1253 2, 6

28 U.S.C. § 2101(b) 2, 6

Supreme Court of the United States, Rule 12 2

Supreme Court of the United States, Rule 15 3, 7

Supreme Court of the United States, Rule 16 3

FRCP. 59(b) 2

Supreme Court of the United States

OCTOBER TERM, 1959. No. 532.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, FOSTER FURCOLO, Governor of the Commonwealth of Massachusetts and EDWARD J. McCORMACK, JR., Attorney General of the Commonwealth of Massachusetts,

Appellants,

vs.

CROWN KOSHER SUPER MARKET OF MASS., INC., IRVING HEAFITZ, MORRIS CHAITOVSKY, RUTH B. COHEN and RABBI MOSES D. SHEINKOPF,

Appellees.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM THE JUDGMENT OR DISMISS THE APPEAL.

I. On May 18, 1959, a three-judge court for the District of Massachusetts, through a majority of its members, delivered the "Opinion of the Court" on the question of the constitutionality of a state statute; McCarthy, District Judge, entered his dissenting opinion. On July 20, 1959, the court again through a majority rendered its

opinion denying appellant's motion for a new trial; McCarthy, J., filed a dissenting memorandum on July 23, 1959. None has been reported.

II. The jurisdiction of this court is invoked under the provisions of 28 U.S.C., § 1253 and § 2101 (b). The appeal is from a final decree of a three-judge court granting a permanent injunction against a public official prohibiting the enforcement of a state statute on the grounds that such statute is unconstitutional.

On June 12, 1959, the defendant's motion to dismiss was denied and a final decree was entered in the United States District Court for the District of Massachusetts, declaring Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, unconstitutional, void and unenforceable as applied to the plaintiffs, and enjoining and restraining the defendant Raymond P. Gallagher, Chief of Police of the City of Springfield, Massachusetts, from enforcing Section 5 of said Chapter 136 as against the plaintiffs.

A motion for new trial was filed in conformity with FRCP, Rule 59 (b) on June 22, 1959, and this motion was denied on July 20, 1959.

On September 18, 1959, the defendant caused to be entered in the United States District Court for the District of Massachusetts its notice of appeal to the Supreme Court of the United States in conformity with U.S.C. § 2101 (b) and under authority of *U.S. v. Ellicott*, 32 S. Ct. 334, 223 U.S. 524, 56 L. Ed. 535.

On October 2, 1959, appellees filed in the U.S. Supreme Court their cross-designation pursuant to Rule 12 of the Revised Rules of this Court.

On November 16, 1959, appellant filed its Jurisdictional Statement in the Supreme Court of the United

States pursuant to Rule 15 of the Revised Rules, and on December 11, 1959 appellees filed their Motion to Affirm the Judgment or Dismiss the Appeal in said Court pursuant to Rule 16.

III. The state statute in question is Massachusetts General Laws (Ter. Ed.) c. 136, §§ 5, 6. Section 5 reads as follows: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars." Section 6, which lists numerous exceptions to section 5, is set forth in full in Appendix "A".

IV. The following questions are presented by this appeal:

1. Does a Three Judge Court have jurisdiction to enjoin a municipal police official from enforcing a statute on the ground that such statute is unconstitutional?

2. Are the plaintiffs proper parties to raise the issues before the Court?

3. Should the Court have exercised its equitable jurisdiction?

4. Do the provisions of the Massachusetts General Laws, Chapter 136, violate the rights, privileges or immunities of the plaintiffs under the Constitution of the United States in interfering with their freedom of religion, by depriving them of their liberty or property without due process of law or by denying them the equal protection of the laws?

5. Has the Three Judge Court correctly applied the Massachusetts statute as interpreted by the Supreme Judicial Court of the Commonwealth?

6. Is the evidence submitted to the Court sufficient as a matter of law to sustain the findings and decree?

7. Is the decree entered by the Court consistent with the findings of fact?

V. The petitioner Crown Kosher Super Market of Mass., Inc. operates a super market in the city of Springfield, Mass., at which all types of meats and groceries were sold including all varieties of kosher foods. The officials owning and operating the market contended that their religious beliefs made it necessary for them to close the market at sun-down on Fridays and to remain closed through sun-down on Saturdays. The market was accordingly closed during these periods but was opened all day on Sundays in violation of Mass. General Laws c. 136, §§ 5 and 6, which makes it a criminal offense to keep open one's shop on Sunday. There are certain exceptions to this prohibition including an exception allowing a kosher meat market to open for the sale of kosher meat on Sunday between the hours of six o'clock and ten o'clock in the forenoon. In 1957 one Harold Chernock, the president and general manager of the corporate plaintiff, Crown Kosher Super Market of Mass., Inc., was convicted in the state courts for keeping open the market in violation of these statutory provisions, *Commonwealth* v. *Chernock*, 336 Mass. 384 (1957).

An equity proceeding in the State courts was also brought by the said Chernock to test the constitutionality of the statute in question but this suit was dismissed by the petitioner. Thereafter the corporate plaintiff together with the other named plaintiffs instituted the present proceeding asserting that the Massachusetts statutory provisions regulating the observance of Sunday is one respecting the establishment of religion, and deprives the plaintiff of their liberty and property arbitrarily, denies the free exercise thereof; and hence is

violative of the due process clause of the Fourteenth Amendment to the United States Constitution; and on the further ground that it denies the equal protection of the laws guaranteed by the Fourteenth Amendment.

The plaintiffs allege that they have no adequate remedy at law and that they will suffer irreparable injury in that the corporate plaintiff will suffer a loss in its gross business by being closed on Sunday, the plaintiff Rabbi will be unable to fulfill his religious duties, and the plaintiff customers will be unable to secure certain provisions prepared in accordance with their religion at times when they are able to purchase them.

Plaintiffs' motion for a preliminary injunction was not pressed; defendant filed a motion to dismiss which was consolidated with the hearing on the merits at the conclusion of which defendant's motion to dismiss was denied and the court, through a majority of its members rendered an opinion concluding that General Laws, c. 136, § 5, is in violation of all the constitutional safeguards enumerated by the plaintiffs in their Complaint, and entered its Final Decree declaring (1) said statute "unconstitutional, void and unenforceable as applied to the plaintiffs in this action, insofar as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday"; (2) enjoining and restraining "the defendant, his agents, servants, and employees, and all others acting in his behalf . . . from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce Section 5 of said Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, against the plaintiffs in this action."

VI. ARGUMENT — IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM THE JUDGMENT OR DISMISS THE APPEAL.

A. In support of their Motion to Affirm the decision of the three-judge court, appellees state that ". . . the questions on which the decision of the cause depends are so insubstantial as not to need further argument . . ." (Motion p. 2). It is respectfully submitted that where a three-judge court enters a Final Decree (J. S. pp. 5-6) declaring a statute "unconstitutional, void and unenforceable . . ." and enjoins and restrains any manner of enforcement thereof, a substantial federal question is raised. It is to be noted that jurisdiction of this appeal from the decision of a three-judge court is conferred on the Supreme Court of the United States by 28 U.S.C. §§ 1253, 2101 (b), and has been sustained in *Radio Corp. of America* v. *United States*, 71 S. Ct. 806, 341 U.S. 412, 95 L.Ed. 1062 (J. S. p. 3). Cf. *Friedman* v. *N. Y.*, 341 U.S. 907 where the Court of Appeals of New York in 302 N. Y. 75, on facts similar to the case at bar *upheld* the state statute. On appeal to the U.S. Supreme Court from the Court of Appeals of New York appellee's motion to dismiss was granted and the appeal was dismissed for want of a substantial federal question. The reverse situation exists in the case at bar for a federal three-judge court has struck down a state statute.

Accordingly, appellant respectfully submits that the questions presented are so substantial within the meaning of the Rules of this Court as to require plenary consideration by this Court and requests that Appellee's Motion to Affirm be denied and that an order issue from this Court noting probable jurisdiction.

B. Appellees' Motion to Dismiss the Appeal is directed specifically (Motion pp. 2, 3, 10–12) to questions Nos. 6 and 7 of Appellant's Jurisdictional Statement. (J. S. p. 4). With respect to question No. 6 — Is the evidence submitted to the Court sufficient as a matter of law to sustain the findings and decree — appellant respectfully submits that it is in conformity with Rule 15 of the Revised Rules: that no "specification" (Motion p. 10) is required by the Rule which expressly states that ". . . it should not resemble in form or particularity the former assignments of error which are abolished . . . ." Nor are specifications a prerequisite for this Court to determine whether briefs and further arguments are necessary, for that is determined by the existence or absence of a substantial federal question, and it is submitted that even without question No. 6, a substantial federal question is raised by virtue of the fact that a three-judge court has struck down a state statute as unconstitutional. Furthermore, paragraph (f) of Rule 15 of the Revised Rules requires that the Jurisdictional Statement include ". . . *a statement of the reasons* why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral arguments, for their resolution." (emphasis added). It is respectfully submitted that this requirement has been complied with (J. S. pp. 6–7); and that not until the case is ripe for briefs and arguments on the merits is it necessary to specify and elaborate upon alleged errors of law.

With respect to question No. 7 — Is the decree entered by the Court consistent with the findings of fact — it is respectfully submitted that pages 5–6 of the Jurisdictional Statement does contain that portion of the Final Decree appealed from and that the appeal has been taken in conformity with the Rules of this Court.

Appellant feels that it would not be in keeping with the rule of conciseness at this time to elaborate upon which findings of fact they believe to be inconsistent with the decree. Similarly, appellant respectfully submits that a detailed discussion as to whether each question in and of itself raises a substantial federal question would more properly be reserved for briefs on the merits and oral arguments particularly since jurisdiction for an appeal from a three-judge court has been conferred by statute and sustained by this Court. (See A, above, and J. S. p. 3.)

Accordingly, appellant respectfully requests that appellees' motion to dismiss be denied.

VII. CONCLUSION.

In conclusion, therefore, the appellant respectfully requests that for the foregoing reasons appellees' motion to affirm the judgment be denied and their motion to dismiss also be denied.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General,
for the Commonwealth of Massachusetts.

JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,
for the Commonwealth of Massachusetts.

JOHN WARREN McGARRY,
Assistant Attorney General,
for the Commonwealth of Massachusetts
and member of the bar of the Supreme
Court of the United States.

S. THOMAS MARTINELLI,
City Solicitor,
Springfield, Massachusetts.

APPENDIX A.

Massachusetts General Laws, Chapter 136, section 6 as appearing in Mass. General Laws (Tercentenary Edition, 1932) and as amended as follows; second and third paragraphs as so appearing amended, 1934, 328 § 7; fourth paragraph amended, 1932, 96; 1934, 354; paragraph added at end, 1933, 150 § 3; section revised, 1934, 373 § 6; second paragraph amended, 1955, 304; revised, 1957, 556 § 16; third paragraph amended, 1936, 129; 1937, 286; 1950, 256 § 1; fourth paragraph amended, 1938, 143; same paragraph revised, 1943, 473; 1950, 681; 1951, 504; 1954, 217; 1957, 356 § 17; last paragraph revised, 1946, 207 § 4; paragraph added at end, 1949, 190; 1950, 322.

SECTION 6. The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical applicances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common

victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of

steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen deserts or frozen desert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half-past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock

noon of that day; the selling or delivering of Kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of Kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and

the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him.

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Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 11

RAYMOND P. GALLAGHER ET AL.,
Appellants,

v.

CROWN KOSHER MARKET OF MASS., INC., ET AL.,
Appellees.

MOTION TO INTERVENE.

Now come George Michaels, of Newton, Massachusetts, Hugh Morton, of Fall River, Massachusetts, and John V. Phelan, of Needham, Massachusetts, all former assistant attorneys general for the Commonwealth of Massachusetts under the late Attorney General George Fingold, and move to intervene in the above-entitled action for the purpose of correcting the record by striking therefrom certain incorrect, unfair and prejudicial language contained in a memorandum dated November 12, 1959, filed in said case by United States District Court Judge William T. McCarthy dissenting from the majority finding by Federal Circuit Court Judges Calvert Magruder and Peter Woodbury. The language to be stricken appears on page 2 of said memorandum as follows:

> "I would be less than candid if I did not make the observation that insofar as the presentation of evidence on behalf of the defendant was concerned, the

case was not tried at all. One need only consult the record in the case and the docket entries on file to appreciate that this is so. The late Attorney General of the Commonwealth apparently contented himself with filing an appearance in its behalf. An Assistant Attorney General was assigned to the case but his activity was confined to the arguing of a motion to dismiss the complaint and to a cross-examination of the one witness who testified on behalf of the corporate plaintiff. In making that observation I make no reflection upon the able Assistant Attorney General who appeared in the court proceedings. Whatever the reasons may have been for the failure of the Commonwealth to investigate the allegations of the complaint, to present evidence on behalf of the defendant, and to uphold the constitutionality of the law of Massachusetts which had been repeatedly upheld by the State Supreme Court, the fact remains that the complete absence of credible evidence has left the record in this case inconclusive and confusing."

An examination of the history of this matter clearly indicates the responsibility for the preparation and handling of said case did not lie with the late Attorney General George Fingold, but this responsibility was unmistakably his successor's. M. Fingold's office first entered this case by the filing of a timely appearance on July 23, 1958; the late Attorney General's untimely death on August 31, 1958, caused the conduct of the case to be the sole responsibility of the present Attorney General, Edward J. McCormack, Jr., who has served continuously since September 10, 1958, two and one-half months prior to the trial of this matter on its merits.

The illness of Mr. Fingold in the late spring and summer of 1958 is common knowledge. In June of 1958 Mr.

Fingold was treated almost daily for heart disease, and, despite warnings of his physician, the late Attorney General insisted upon personally appearing before the Federal Court in New Haven in a matter vitally important to the citizens of the Commonwealth. As a result of severe and constant emotional and physical strain during this period, Mr. Fingold suffered a thrombus on the heart wall which became dislodged and caused a cerebral embolus on July 16, 1958. He never fully recovered from this episode and died on August 31, 1958, having suffered another heart attack on that date. The present Attorney General, Edward J. McCormack, Jr., took office on September 10, 1958.

In view of the fact that more than two months have passed since the District Court Judge William T. McCarthy filed his memorandum as indicated above, and in view of the fact that none of the parties to this matter has disputed the invalidity of the statements contained in said memorandum, counsel ask to be allowed to intervene for the purpose of correcting the record by striking therefrom said statements, which are inconsistent with the facts.

GEORGE MICHAELS,
75 State Street,
Boston 9,
Massachusetts.

HUGH MORTON,
21 Bedford Street,
Fall River,
Massachusetts.

JOHN V. PHELAN,
1492 Highland Avenue,
Needham 92,
Massachusetts.

IN THE

Supreme Court of the United States

October Term, 1960

No. 11

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, Massachusetts,

Appellant,

vs.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC.,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated; and RABBI MOSES D. SHEINKOPF, CHIEF ORTHODOX RABBI OF THE UNITED ORTHODOX CONGREGATIONS OF SPRINGFIELD AND PRESIDENT OF THE MASSACHUSETTS COUNCIL OF RABBIS, suing on behalf of himself and the Rabbis similarly situated,

Appellees.

No. 67

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL *AMICI CURIAE*

LEO PFEFFER
Attorney for Amici Curiae
15 East 84th Street
New York 28, N. Y.

LEWIS H. WEINSTEIN
CHARLES P. KRAMER
MORTIMER BRENNER
SIDNEY POLIER
SAMUEL LAWRENCE BRENNGLASS
PHILIP JACOBSON

Of Counsel

307 BAR PRESS, INC., 54 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 5-9452

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICI	2
PRELIMINARY STATEMENT	5
THE STATUTES INVOLVED	5
THE QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED	6
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. The Sunday laws are Religious statutes whose enforcement violates the first amendment ban on laws respecting an establishment of Religion	7
A. The Applicability of the First Amendment to the States	7
B. The Meaning of the No Establishment Clause	7
C. The Sunday Laws as Religious Laws	8
D. Historical Background of the Massachusetts Sunday Law	9
E. Historical Background of the Pennsylvania Sunday Law	14
F. Latter Day Rationalizations	16

PAGE

II. The Massachusetts and Pennsylvania Sunday laws restrict the free exercise of religion in violation of the first amendment . 24

A. Establishing Religion and Prohibiting Its Free Exercise 24

B. The Sunday Laws as Restrictions on Religious Liberty 25

C. Religious Liberty and the States' Police Power 29

III. Because of the complete irrationality of their inclusions and exclusions, the Massachusetts and Pennsylvania Sunday laws constitute deprivations of liberty and property without due process of law and denials of the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution 32

A. The Requirement of Equality 32

B. The Inequality of the Sunday Laws 34

CONCLUSION 38

APPENDIX 39

Massachusetts General Laws, Chapter 135, Observance of the Lord's Day 39

Sec. 5. Keeping open shop, etc., and doing certain work, etc., prohibited 39

Sec. 6. Limit of operation of Section 5 39

Pennsylvania Sunday Law 44

TABLE OF AUTHORITIES

Cases:	PAGE
Adler v. Board of Education, 342 U. S. 485	28
Allen v. Colorado, 101 Colo. 498	36
American Communications Association v. Douds, 339 U. S. 382	27
Bayside Fish Flour Co. v. Gentry, 297 U. S. 422	33
Binney v. Long, 299 U. S. 280	33
Borden's Farm Products, Inc. v. Baldwin, 293 U. S. 194	33
Cantwell v. Connecticut, 310 U. S. 296	7, 24, 29
Chaplinsky v. New Hampshire, 315 U. S. 568	29
Commonwealth v. American League Baseball Club of Philadelphia, 290 Pa. 136	17
Commonwealth v. Bauder, 14 D. & C. 2d (Pa.) 571	19
Commonwealth v. Cavalerro, Decided April 20, 1960, Quarter Sessions Court of Philadelphia, Pa.	35
Commonwealth v. Dextra, 143 Mass. 28	17
Commonwealth v. Has, 122 Mass. 40	18, 19, 25
Commonwealth v. McCarthy, 244 Mass. 484	18
Commonwealth v. Pedano, 33 D. & C. (Pa.) 551	17
Commonwealth v. Wesbit, 34 Pa. 398	19
Commonwealth v. White, 190 Mass. 578	16, 19
Davis v. Beason, 133 U. S. 333	27, 29
Davis v. Somerville, 128 Mass. 594	17, 18
Denver v. Bach, 26 Colo. 530	36
Elliot v. State, 29 Ariz. 389	36
Everson v. Board of Education, 330 U. S. 1	7, 24, 26, 27
Ex Parte Ferguson, 70 P. 2d (Okla. Ct. Cr. App.) 1094	37
Ex Parte Hodges, 83 P. 2d (Okla. Ct. Cr. App.) 201	37

PAGE

Follett v. Town of McCormick, 321 U. S. 573 26

Garner v. Los Angeles Board of Public Works, 341 U. S. 716 28
Gestano Bocai and Sons Co. v. Lawndale, 208 Cal. 720, 284 Pac. 654 37
Goesaert v. Clearly, 335 U. S. 464 33
Gronlund v. Salt Lake City, 194 P. 2d (Utah) 464 37
Gulf, Colorado & Sante Fe Ry. v. Ellis, 165 U. S. 150 33

Henderson v. Antonacci, 62 S. 2d (Fla.) 5 37

Jacobson v. Massachusetts, 197 U. S. 11 29
Jones v. Union Guano Co., 264 U. S. 171 33

Kedroff v. St. Nicholas Cathedral, 344 U. S. 94 7, 24
Kelly v. Blackburn, 95 S. 2d (Fla.) 260 37
Krieger v. State, 12 Okla. Cr. 566, 160 Pac. 36 31
Marsh v. Alabama, 326 U. S. 501 7, 24, 29
McPherson v. Blacker, 146 U. S. 1 33
Meyer v. Nebraska, 262 U. S. 390 33
Morey v. Doud, 354 U. S. 457 33
Mt. Vernon v. Julian, 369 Ill. 447 36
Murdock v. Pennsylvania, 319 U. S. 105 7, 26

Pearce v. Atwood, 13 Mass. 324 16
People ex rel. McCollum v. Board of Education, 333 U. S. 203 7, 24
Pierce v. Society of Sisters, 268 U. S. 510 33
Prince v. Massachusetts, 321 U. S. 158 29

Reynolds v. United States, 98 U. S. 145 27, 29

Skinner v. Oklahoma, 316 U. S. 535 37
Specht v. Commonwealth, 8 Pa. 312 19
Speiser v. Randall, 357 U. S. 513 28

PAGE

Springfield v. Smith, 322 Mo. 1129, 19 S. W. 2d 1 ... 37
State v. Cheaney, 29 Okla. Cr. 251, 233 Pac. 236 ... 31

Thomas v. Collins, 323 U. S. 516 ... 28, 29, 30
Thornhill v. Alabama, 310 U. S. 88 ... 30

United Public Workers of America v. Mitchell, 330 U. S. 75 ... 28
United States v. Carolene Products, 304 U. S. 144 ... 30
United States ex rel. Milwaukee Social Democratic Publishing Company v. Burleson, 255 U. S. 407 ... 28
Updegraph v. Commonwealth, 11 S. & R. 393 ... 17

West Virginia State Board of Education v. Barnette, 319 U. S. 624 ... 30

Zorach v. Clauson, 343 U. S. 306 ... 20

Texts:

American State Papers on Freedom of Religion ... 11, 13

Hening, *Virginia Statutes* ... 11
Holy Scriptures, Exodus ... 9
Hosmer, I., *Winthrop's Journal* 61-62 ... 14

Johnson and Yost, *Separation of Church and State in the United States* ... 11, 12

Pfeffer, *Church, State, and Freedom* ... 10, 22
Pfeffer, *Creeds in Competition* ... 23

Trussman and Ten Broak, *"The Equal Protection of the Laws,"* 37 Calif. L. Rev. 341 ... 33

PAGE

Statutes:

Gen. Stat. Conn., 1949 Rev., Sec. 8609 31

Illinois Smith-Hurd Ann. Stat., Ch. 38, Sec. 549 31

Burns Indiana Stat. (1933) Ch. 43, Sec. 10-4301 31

Iowa Code Ann., Ch. 729, Sec. 1 31

Ky. Stats. of 1903, 436, 1950 31

Maine Laws, Ch. 121, Sec. 36 31

Mass. G. L., c. 149, Sec. 48 29

Mass. G. L. (Ter. Ed.) c. 136, Secs. 5, 6, 21-32 5, 12

Mich. Stat., Vol. 13, Sec. 18.855 31

Page's Ohio Gen. Code Ann., Sec. 130.5 31

Act of March 31, 1937, P. L. 159, Sec. 1, 43 Purd. Stat. Sec. 481 (Pa.) 23

Act of May 27, 1897, P. L. 112, Sec. 1, 43 Purd. Stat. Sec. 361 (Pa.) 23

Act of May 13, 1915, P. L. 286, Sec. 4, as amended, 43 Purd. Stat. Sec. 46 (Pa.) 23

Act of July 25, 1913, P. L. 1024, Sec. 3, as amended, 43 Purd. Stat. Sec. 103(a) (Pa.) 23

Act of January 12, 1705 (Pa.) 15

Act of November 27, 1700, (Pa.) 15

Act of April 22, 1794 Sec. 1 (Pa.) 15

Duke of Yorke's Book of Laws, 1676-1682, pp. 107, 108 (Pa.) 14

P. L. No. 212, 18 Purd. Stat. Sec. 4699.10 (Pa.) 5, 19

Okla. Stat. 1951, Title 21, Sec. 1909 31

W. Va. Code of 1943 Ann., Sec. 6073 31

Wis. Stat., Sec. 351.52 31

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Appellees.

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL *AMICI CURIAE*

Interest of the *Amici*

This brief is submitted on behalf of the Synagogue Council of America and the National Community Relations Advisory Council.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly of America, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The National Community Relations Advisory Council is a co-ordinating body comprised of the following national lay Jewish organizations, in addition to the congregational bodies mentioned above, concerned with American Jewish community relations:

American Jewish Congress
Jewish Labor Committee
Jewish War Veterans of the United States

and fifty-two local Jewish Community Councils, including all the major cities in the United States.[1]

The organizations affiliated with the Synagogue Council of America and the National Community Relations Advisory Council include in their membership the over-

[1] The constituent Community Councils are the following: Jewish Welfare Fund of Akron; Albany Jewish Community Council; Atlanta Jewish Community Council; Federation of Jewish Charities of Atlantic City, N. J.; Baltimore Jewish Council; Jewish Community Council of Metropolitan Boston; Jewish Community Council, Bridgeport, Conn.; Brooklyn Jewish Community Council; Community Relations Committee of the Jewish Federation of Camden County, N. J.; Jewish Community Federation, Canton, Ohio; Cincinnati Jewish Community Relations Committee; Connecticut Jewish Community Relations Council; Jewish Federation of Delaware; Jewish Community Council of Metropolitan Detroit; Eastern Union County, N. J., Jewish Community Council; Jewish Community Council of Easton and Vicinity; Jewish Community Council of Essex County, New Jersey; Jewish Community Council of Flint, Mich.; Jewish Federation of Fort Worth, Tex.; Community Relations Committee of the Hartford (Conn.) Jewish Federation; Indiana Jewish Community Relations Council; Indianapolis Jewish Community Relations Council; Jewish Community Council, Jacksonville, Florida; Community Relations Bureau of the Jewish Federation and Council of Greater Kansas City; Kingston, N. Y. Jewish Community Council; Community Relations Committee of the Jewish Federation Council of Greater Los Angeles; Milwaukee Jewish Council; Jewish Community Relations Council of Minnesota; Nashville Jewish Community Council; Jewish Federation of New Britain, Conn.; New Haven Jewish Community Council; Jewish Community Relations Council of Oakland, Calif.; Jewish Community Council of Paterson, N. J.; Jewish Community Council of Peoria, Ill.; Jewish Community Council, Perth Amboy, N. J.; Jewish Community Relations Council of Greater Philadelphia; Jewish Community Relations Council, Pittsburgh; Richmond Jewish Community Council; Jewish Community Council, Rochester, N. Y.; Jewish Community Relations Council of St. Louis; Community Relations Council of San Diego; San Francisco Jewish Community Relations Council; Jewish Community Council, Schenectady, N. Y.; Scranton-Lackawanna Jewish Council; Jewish Community Council of Toledo; Tulsa Jewish Community Council; Jewish Community Council, Utica; Jewish Community Council of Greater Washington (D. C.); Jewish Federation of Waterbury; Jewish Community Relations Council of the Jewish Federation of Youngstown, Ohio.

whelming majority of Americans affiliated with Jewish organizations. We believe, therefore, that in submitting this brief we speak for the greater part of American Jewry.

Our interest in the cases before this Court is twofold. In the first place, the appellees in the *Crown Kosher* case and the appellants in *Braunfeld* v. *Gibbons* are Orthodox Jews who observe the seventh day of the week as their Sabbath and refrain from all secular business and labor on that day. Enforcement of compulsory Sunday observance laws against them constitutes, in our view, a serious infringement of their civil, religious and economic rights and imposes a heavy burden upon their adherence to their religious beliefs.

However, our concern extends beyond the interests of the particular parties to this litigation. We would be concerned even if Braunfeld and the proprietors of Crown Kosher were not Jews or observers of the seventh day of the week as the Sabbath. We believe that the principle of religious liberty is impaired if any person is penalized for adhering to his religious beliefs, or for not adhering to any religious belief, so long as he neither interferes with the rights of others nor endangers the public peace or security.

For these reasons we sought and obtained the consent of counsel for the parties to submit this brief *amicus curiae*.

Preliminary Statement

The two cases in which this brief is filed challenge the constitutionality respectively of the Massachusetts and Pennsylvania Sunday laws as enforced against retail merchants of the Jewish faith who observe Saturday as their Sabbath and refrain from all labor or secular business on that day. Both cases were instituted in statutory Federal District Courts for injunctions to prevent enforcement of the statutes against the respective plaintiffs. The complaints in both assert that the assailed statutes are unconstitutional because they establish the first day of the week as a religious day, contrary to plaintiffs' religion, restrict the plaintiffs in the free exercise of their religion and deny to them the equal protection of the law.

The Statutes Involved

The statute involved in the Massachusetts suit is Mass. G. L. [Ter. Ed.] c. 136, and specifically sections 5 and 6 thereof. The statute involved in Pennsylvania is P. L. No. 212, 18 Purd. Stat. Sec. 4699.10. Both statutes make it a penal offense to engage in a variety of activities upon the first day of the week. The relevant sections of both statutes are set forth as an Appendix to this Brief.

The Questions to Which This Brief is Addressed

This brief is addressed to three principal issues:

1. Do the assailed statutes unconstitutionally violate the First Amendment to the Federal Constitution as prohibited laws respecting an establishment of religion?

2. Do they unconstitutionally violate the Amendment as laws prohibiting the free exercise of religion?

3. Do they unconstitutionally violate the Fourteenth Amendment as laws depriving plaintiffs of their liberty and property without due process of law and denying them the equal protection of the laws?

Summary of Argument

Both the Massachusetts and Pennsylvania Sunday laws are religious laws and their enforcement is therefore beyond the comptence of a state constitutionally enjoined from enacting any law respecting an establishment of religion.

Even if they should be deemed welfare laws they unconstitutionally restrain the religious freedom of persons impelled by conscience to observe a day other than Sunday as their weekly day of rest.

The laws are so lacking in rationality in respect to the distinction between activities permitted on Sunday and those prohibited and with respect to persons permitted to engage in business on Sunday and those for-

bidden to do so that they must be adjudicated completely arbitrary. Their enforcement, therefore, constitutes a deprivation of liberty and property without due process of law and a denial of the equal protection of the laws.

Argument

I. The Sunday laws are religious statutes whose enforcement violates the First Amendment ban on laws respecting an establishment of religion.

A. The Applicability of the First Amendment to the States

It is no longer open to question that the religion clause of the First Amendment to the Federal Constitution is applicable to the States no less than to the Federal Government. Moreover, its applicability extends equally to the no establishment and the free exercise provisions. The states and the Federal government are therefore equally forbidden to enact or enforce any laws respecting an establishment of religion or prohibiting its free exercise. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Marsh* v. *Alabama*, 326 U. S. 501; *Everson* v. *Board of Education*, 330 U. S. 1; *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203; *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94.

B. The Meaning of the No Establishment Clause

In the *Everson* case, *supra*, and again in the *McCollum* case, *supra*, the Supreme Court spelled out the meaning of the no-establishment clause in the following definitive language:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

The First Amendment, the Court held in both cases, imposes upon government an obligation of neutrality, not merely as between competing sects and faiths, but also as between religion and non-religion. It forbids the use of law as an instrument of church policy or an engine to further church purposes. In short, the First Amendment bars governmental intervention in religious affairs.

C. The Sunday Laws as Religious Laws

It follows that if the Sunday laws in issue herein are primarily and principally religious laws their enforcement constitutes a violation of the no establishment clause. This is so for a number of reasons. In the first place, it involves governmental intervention in religious affairs.

Secondly, it constitutes governmental aid to religion to a substantial extent. Third, it violates the obligation of neutrality as between religion and non-religion. Finally, it obviously prefers one religion, Sunday observing Christianity, over all other religions, including Saturday observing Christianity and Judaism.

We submit that any objective examination of both the Massachusetts and the Pennsylvania Sunday laws must lead to the conclusion that they are essentially religious laws. This conclusion is based on the historical background of the laws and is reinforced by their contemporary operation and effect.

D. *Historical Background of the Massachusetts Sunday Law*

Compulsory observance of the Sabbath goes back, of course, to Mount Sinai, and to the command that:

> "Ye shall keep the sabbath therefore; for it is holy unto you; every one that defileth it shall surely be put to death; for whosoever doeth any work therein, that soul shall be cut off from among his people. Six days may work be done; but in the seventh is the sabbath of rest, holy to the Lord; whosoever doeth any work in the sabbath day, he shall surely be put to death." *Exodus* 31:14, 15.

The Sabbath of Sinai was the seventh day of the week. (It is rather ironical that persons facing criminal prosecution in the present case are those who comply with the Biblical command to observe the Sabbath on the seventh day of the week.) The earliest recognition of Sunday by Christians is recorded by Justin Martyr, who reported

that in the second century the Christians in Rome gathered on that day to hear readings from the Scriptures, participate in common prayer, and dine together, in the manner in which the Jews celebrated the Biblical Sabbath. Pfeffer, *Church, State and Freedom*, p. 228.

Sunday was selected as the day of the resurrection of Jesus, but it was also the day observed by the Mithraists, another popular cult, as the day of the Sun-god. Constantine, as part of his program of empire unification, promulgated the first compulsory Sunday law in the year 321. The law read:

> All judges and city people and the craftsmen shall rest upon the venerable Day of the Sun. Country people, however, may freely attend to the cultivation of the fields, because it frequently happens that no other days are better adapted for planting the grain in the furrows or the vines in the trenches. So that the advantage given by heavenly providence may not for the occasion of a short time perish.

At about the same time soldiers in the army were commanded to worship on the "Lord's Day"; lawsuits were prohibited on that day, and circus spectacles and theatrical shows were likewise forbidden.

Thereafter Sunday observance laws were promulgated in Garel under the Merovingian kings and Charlemagne, and in England under the Anglo-Saxon kings. One American court epitomized the history of Sunday legislation as follows:

> "All Sunday legislation is the product of pagan Rome; the Saxon laws were the product of Middle Age legislation of the Holy Roman Empire. The English laws are the expansion of the Saxon, and the American

> are the transcript of the English." * * * During the Middle Ages, the civil authorities exercised the right to legislate in religious matters after the manner of the Jewish theocracy.—Quoted in Johnson and Yost, *Separation of Church and State in the United States*, p. 222.

The first Sunday law to be promulgated in what is now the United States was the Virginia law of 1610. This law, a product of the church-state union of that colony, provided:

> "Every man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day, and in the afternoon to divine service, and catechising, upon pain for the first fault to lose their provision and the allowance for the whole week following; for the second, to lose the said allowance and also be whipt; and for the third to suffer death." 1 Hening, Virginia Statutes, p. 123.

Massachusetts Bay Colony was established as a union of church and state, and it is therefore hardly surprising that almost simultaneously with its receipt of a charter it should enact a compulsory Sunday observance law. This law, enacted in 1629, read:

> To the end the Sabbath may be celebrated in a religious manner, we appoint that all that inhabit the plantation, both for the general and particular employments, may surcease their labor every Saturday throughout the year at 3 of the cloek in the afternoon, and that they spend the rest of the day in catechising and preparation for the Sabbath, as the ministers shall direct. *American State Papers on Freedom of Religion*, p. 30.

The "Records of the Governor and Company of the Massachusetts Bay in New England" report that in November of 1630 "It is ordered, that John Baker shall be whipped for shooting at fowl on the Sabbath day." *Ibid.*

Five years later, in 1635, the Massachusetts General Court decreed that:

> Whereas complaint hath been made to this Court that diverse persons within this jurisdiction do usually absent themselves from church meetings upon the Lord's Day, power is therefore given to any two Assistants to hear and censure, either by fine or imprisonment all misdemeanors of that kind committed by any inhabitant within this jurisdiction, provided they exceed not the fine of 5 shillings for one offense. *Ibid.*

As can be seen, this ordinance was aimed at assuring church attendance on the Lord's Day. This and avoidance of profanation by servile work have been the two motivations of Sunday laws. That inducing church attendance is a primary motivation of Sunday laws is evident from the fact that the first amendment ever enacted to a Sunday law to allow sports, a statute enacted in England in 1618 during the reign of the sports-loving James I, specifically limited permission to engage in sports on the Lord's Day to the period after church services. Johnson and Yost, *Separation of Church and State*, p. 221. That this motivation is still a primary factor in the statutes here in issue is evident by the fact that they too permit engagement in or witnessing of sports on the Lord's Day only after 2 P.M., *i.e.*, after church services. Mass. G. L. chapter 136, §§21-26; Penn. P. L. 74 sec. 2, 4 Purd. St. Sec. 82.

The progenitor of the Massachusets compulsory Sunday observances law here in issue was "An Act for the Better Observation and Keeping of the Lord's Day" promulgated in the Bay Colony in 1692, as can be seen from a comparison of the two statutes. The 1692 statute read:

> That all and every person and persons whatsoever, shall on that day carefully apply themselves to duties of religion and piety, publicly and privately; and that no tradesman, artificer, laborer, or other person whatsoever, shall upon the land or water, do or exercise any labor, business or work of their ordinary callings; nor use any game, sport, play, or recreation on the Lord's Day, or any part thereof (works of necessity and charity only excepted); upon pain that every person so offending shall forfeit five shillings * * *. And in case any such offender be unable or refuse to satisfy such fine, to cause him to be put in the cage, or set in the stocks, not exceeding three hours. *American State Papers on Freedom of Religion*, p. 37.

As early as 1631 Roger Williams recognized that the Massachusetts compulsory Sunday law was a religious law whose enforcement was inappropriate by a secular state. Williams was of the view that human tribunals were authorized to punish only offenses against the second of the Two Tables (Ten Commandments), *i.e.*, Commandments 6 to 10, since these dealt with offenses of man against man, and not offenses against the First Table (Commandments 1 to 5), since these involved man's relationship to God. The journal of Governor Winthrop of Massachusetts Bay in 1631 contains the following notation:

> At a court holden at Boston * * * a letter was written from that court to Mr. Endecott to this effect: That

* * * Mr. Williams * * * had declared his opinion that the magistrate might not punish the breach of the Sabbath, * * * as it was a breach of the first table. Hosmer, I *Winthrop's Journal*, 61-62.

E. *Historical Background of the Pennsylvania Sunday Law*

The historical background of the Pennsylvania Sunday Law is in essence similar to that of the Massachusetts law.

The original Pennsylvania Sunday Law of 1682, *Duke of Yorke's Book of Laws* 1676-1682, pages 107, 108 provided inter alia, as follows:

> "Whereas, the glory of Almighty God and the good of Mankind, is the reason & end of government, and, therefore, government in itself is a venerable Ordinance of God. And forasmuch as it is principally desired and intended by the Proprietary and Governor and the freemen of the Province of Pennsylvania and territories thereunto belonging, to make and establish such Laws as shall best preserve true Christian and Civil Liberty, in opposition to all Unchristian, Licentious and unjust practices, (Whereby God may have his due, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.
>
> "Be It Therefore Enacted by William Penn, Proprietary and Governour, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid, in Assembly met, and by the Authority of the same, That These follow-

ing Chapters and Paragraphs shall be the Laws of Pennsylvania and the territories thereof. "Chap. 1. Almighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind * * *

"BE IT ENACTED BY THE AUTHORITY AFORESAID, That * * * to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That, according to the example of the primitive Christians, and for the ease of the Creator, Every first day of the week, called the Lord's Day, People shall abstain from their usual and common toil and labour. That whether Masters, Parents, Children, or Servants, they may the better dispose of themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best suite their respective persuasions."

The foregoing Act of 1682 was substantially re-enacted on November 27, 1700 and on January 12, 1705.

The Act of April 22, 1794, Section 1, 3 Smith's Laws, page 177, from which the present law is derived, provided inter alia:

"That from and after the first day of August next, if any person shall do or perform any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practice any unlawful game, and be convicted thereof, every such person, so offending shall, for every such offence, forfeit and pay four dollars, to be levied by distress; or in case he or she shall refuse or neglect to pay the said sum,

or goods and chattels cannot be found, whereof to levy the same by distress, he or she shall suffer six days imprisonment in the house of correction of the proper county. PROVIDED ALWAYS, That nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment, for the use of sojourners, travellers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families, on the Lord's Day, commonly called Sunday, nor to the delivery of milk, or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day."

F. Latter Day Rationalizations

In the light of this history, the religious origin of both the Massachusetts and Pennsylvania Sunday laws is hardly controvertible. Indeed, it is not controverted at all. In both states the courts from their earliest days and on frequent occasions since have traced the present Sunday laws to the Colonial ancestors.

In Massachusetts, in the very early case of *Pearce v. Atwood*, 13 Mass. 324, involving an arrest made on Sunday, the court described the Lord's Day law as "a statute enacted for the sole object of ensuring reverence and respect for one day of the week, in order that religious exercises should be performed without interruption from common and secular employments." In *Com. v. White*, 190 Mass. 578, the court said quite simply (at p. 581) that the law "was originally inserted to secure the observance of the Lord's Day in accordance with the views of our ancestors.

and it ever since has stood and still stands for the same purpose." See also, *Com.* v. *Dextra*, 143 Mass. 28; *Davis* v. *Somerville*, 128 Mass. 594.

Quite revealing as to the religious background of the Pennsylvania law is the following statement by a Pennsylvania court:

> The present act (of 1794) was enacted as a direct result of the yellow fever plague of 1793 which ran rampant in Philadelphia. The plague was regarded as 'a scourge upon a wicked people.' The Pennsylvania legislature hastened to legislate away the wickedness of the people by shackling the devil in his most prosperous day. *Commonwealth* v. *Pedano*, 33 D&C 551, 553.

Perhaps the frankest statement by a Pennsylvania court was made in 1927 by the Supreme Court of that state, in the case of *Commonwealth* v. *American League Baseball Club of Philadelphia*, 290 Pa. 136 at 143:

> Christianity is part of the common law of Pennsylvania (*Updegraph* v. *Commonwealth*, 11 S & R 393) and its people are Christian people. Sunday is the holy day among Christians.

Only in recent years, particularly after it was recognized that the First Amendment's ban on laws respecting an establishment of religion or prohibiting its free exercise is applicable to the states, has there been an effort to justify the compulsory Sunday laws as welfare rather than religious statutes. This newer theory is that these laws have been divorced from their religious origin and that they have now become purely secular laws, enacted under the police power of the State to ensure at

least one day rest in seven. In Massachusetts, this justification was first expressed in *Com.* v. *Has,* 122 Mass. 40, in the following language:

> It [the Sunday law] is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, any one who deems another day more suitable for rest or worship may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community.

Significantly, the record in *Com.* v. *Has,* shows that the complaint in that case was that the defendant kept his shop open on Sunday "to the great scandal of religion, against good morale and manners, and against the peace of said Commonwealth."

In *Com.* v. *McCarthy,* 244 Mass. 484, the court, after quoting extensively from *Davis* v. *Somerville,* *supra,* re-

emphasized that the statute "was enacted to secure respect and reverence for the Lord's Day."

Similar rationalizations are to be found in Pennsylvania cases. *Specht* v. *Commonwealth*, 8 Pa. 312, 323; *Commonwealth* v. *Bauder*, 14 D & C 2d 571.

We respectfully submit that the rationalization of these cases is unreal, bordering, in fact, upon the fictitious. We submit that what is essentially a religious law cannot be made a secular or civil law simply by calling it such. We offer the following reasons in support of our claim that the Massachusetts and Pennsylvania compulsory Sunday observance laws here in issue are what they always have been—religious laws.

1. Their origin, as we have seen, is incontrovertibly religious. Neither the Massachusetts nor the Pennsylvania legislature has ever evidenced any intent to change the religious motivation. At no time have the Old Colonial laws been repealed and replaced by new laws based upon the legislative finding that a day of rest is necessary for reasons of health. On the contrary, the courts have consistently held that the present law "still stands for the same purpose" as the concededly religious Colonial law. *Com* v. *White*, 190 Mass. 578, 581; *Com.* v. *Wesbit*, 34 Pa. 398. This conclusion is fortified by the fact that the Massachusetts statute at least even today does not speak of "Sunday," but of "the Lord's Day." Such designation of the day of compulsory abstinence from secular affairs can hardly be called secular.

2. In *Com* v. *Has*, *supra*, the Massachusetts court said that the "act imposes upon no one * * * attendance upon

any form of worship." Yet, the act permits participation and engaging in sports only after 2 P.M., (in Pennsylvania, P. L. 74 Sec. 2, 4 Purd. St. Sec. 82) and this limitation, as we have seen, is motivated by a desire not to allow activities which some might find more attractive than attendance at church. While thus forbidding all pleasurable and profitable activities during the time of church services may not force a person to go to church, it certainly influences him in that direction; and in the *Everson* and *McCollum* cases, *supra*, the Supreme Court held that under the no-establishment clause a State can neither force "nor influence a person to go to or remain away from church * * *." In any event, we can think of no reasonable explanation for the limitation of sports to the afternoon other than to avoid competition with church services.

In *Zorach* v. *Clauson*, 343 U. S. 306, this Court held it permissible for public school authorities to excuse children from attending school for an hour each week if they participate in religious instruction during that time. This, the Court said, was not aid to religion but no more than an accommodation of the school schedule to the religious needs of the children. But suppose that law forbids school to be in session during the time of religious instruction; and suppose it went further and made it a criminal offense for the children to participate in secular instruction or in any other activities while the religious class was in session. Could there be any doubt that such a law would be in aid of religion and violative of the First Amendment even though it did not expressly impose upon anyone "attendance upon" religious instruction?

This, we submit, is the situation here. The legislative intent to aid religion by closing all roads other than those leading to church seem to us to be incontrovertible.

3. The Sunday laws here in issue do not in fact require anyone to rest on Sunday. They merely require some trades, businesses and occupations not to operate on that day. They impose no obligation of rest upon those businesses—almost too numerous to count—that are permitted to operate on Sunday, and nothing in the Sunday laws prohibits persons from engaging in a forbidden business for six days of the week and in a permitted business on Sunday. Such a person could engage in business seven days each week without any rest and yet would not violate the statutes here in issue.

The businesses permitted by the statutes here in issue undoubtedly employ hundreds of thousands of persons in Massachusetts and Pennsylvania. As far as these statutes are concerned these persons may work seven days a week. Indeed, in one instance at least, the Massachusetts statute not merely permits but encourages work seven days each week. The opening sentence of the second paragraph of Section 6 of the Massachusetts statute permits the sale of tobacco only by those "newsdealers whose stores are open for the sale of newspapers *every day in the week.*" What kind of health or welfare law is it that places a premium upon working seven days a week?

4. Actually the predominant purpose of the statutes is not to ensure rest but to prevent defilement of the Sunday Sabbath. They are aimed not at persons but at businesses. They seek to prevent secularization of the

Lord's Day. If that were not so, why select the Lord's Day as the one day of the week upon which persons shall rest? So far as health is concerned, it makes no difference whether a person rests every Wednesday or every Sunday. Why should not each business owner decide for himself the day of the week on which he will refrain from operations? Businesses are conducted in the open and there would be no practical difficulties in enforcing such a law. In Great Britain and in some dozen or so states in this country, persons who observe a day other than Sunday as their day of rest are permitted to operate their businesses on Sunday. Pfeffer, *Church, State and Freedom*, p. 230. These exemptions have been on the law books for many years and there is no evidence that enforcement has been impracticable anywhere.

5. That the primary purpose of the statutes here in issue is not to insure one day of rest in seven is established by the fact that both Massachusetts and Pennsylvania have laws completely independent of the Lord's Day statutes here in issue, that require one day of rest in seven. Chapter 149, §48, of the Massachusetts General Laws provides that "Every employer of labor engaged in carrying on any manufacturing, mechanical or mercantile establishment or workshop in the commonwealth shall allow every person * * * employed in such manufacturing, mechanical or mercantile establishment or workshop at least twenty-four consecutive hours of rest * * * in every seven consecutive days." This, we submit, is a true health or welfare law. It does not designate the twenty-four hour period, for it recognizes that as far as rest is concerned twenty-four hour periods are fungible. It is

religion, not health, that makes one particular twenty-four hour period unique and superior to all the others.

Pennsylvania, like Massachusetts, has enacted a series of genuine labor laws comprehensively covering this subject. See, e.g., Act of July 25, 1913, P. L. 1024, §3, as amended, 43 Purd. Stat. §103(a) (Women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended, 43 Purd. Stat. §46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, §1, 43 Purd. Stat. §361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, §1, 43 Purd. Stat. §481 (employees of motion picture theatres must be given one day of rest per week).

6. The religious nature of Sunday laws is further evidenced by the nature of those who promote and defend them. The chief protagonists of such laws in the United States are the Lord's Day Alliance, an agency of Protestantism, and the Roman Catholic Church. Pfeffer, *Creeds in Competition*, p. 109-110. In the Massachusetts case herein, briefs *amici curiae* were filed on the one side by an association of Seventh Day Adventists and on the other by the Lord's Day League and the Archdiocesan Council of Catholic Men. In the Pennsylvania case a brief *amicus* was submitted by the Rabbinical Association of Philadelphia, the Philadelphia Board of Rabbis and the Jewish Community Relations Council of Greater Philadelphia.

We submit too, that a fair, objective consideration of all the evidence, contemporary as well as historical, leads but to one answer: The compulsory Sunday observance statutes challenged herein are religious laws and their enforcement is interdicted by the First Amendment's ban on laws respecting an establishment of religion.

II. The Massachusetts and Pennsylvania Sunday laws restrict the free exercise of religion in violation of the First Amendment.

A. Establishing Religion and Prohibiting Its Free Exercise

The prohibition against laws prohibiting the free exercise of religion in the First Amendment to the Federal Constitution, like the ban on laws respecting an establishment of religion, is made applicable to the States by the Fourteenth Amendment. *Cantwell* v. *Connecticut, supra; Marsh.* v. *Alabama, supra; Kedroff* v. *St. Nicholas Cathedral, supra.*

If, as we have sought to establish, the Sunday laws are laws respecting an establishment of religion, they are also laws prohibiting the free exercise thereof. Any law which "forces or influences a person to go to or remain away from church" or punishes him "for entertaining or professing religious beliefs or disbeliefs" (*Everson* case, *supra; McCollum* case, *supra*) is obviously a law prohibiting the free exercise of religion as much as it is a law respecting an establishment of religion.

We contend, however, that even if the statutes here in issue are not religious laws, but are motivated purely by health considerations and, nowithstanding their religious origin, they are now to be deemed an exercise of the State's police power to protect welfare, they are nevertheless unconstitutional infringments upon the religious liberty of the appellee in the Massachusetts case and the appellants in the Pennsylvania case, as well as upon all others who observe a day, other than Sunday, as their religiously required day of rest.

B. *The Sunday Laws as Restrictions on Religious Liberty*

We do not believe extended argument is necessary to establish that the Sunday law restricts the religious liberty of those whose conscience requires them to observe a day other than Sunday as their religious day of rest. We do not consider either realistic or valid the almost cavalier statement of the Massachusetts court in *Com* v. *Has, supra,* that "any one who deems another day more suitable for rest or worship may devote that day to the religious observance which he deems appropriate." Requiring such a person to abstain from engaging in his trade or business two days each week whereas his Sunday observing competitor is required to abstain only one day a week obviously imposes upon the former a competitive disadvantage and thus penalizes him for adhering to his religious beliefs.

The fact that an economically costly alternative is present does not remove the compulsion. Many small Sabbatarian merchants simply cannot continue in business under so severe a competitive disadvantage and have no choice but to yield their means of livelihood or compromise their religious convictions. Even those who can manage to survive suffer substantial economic loss. The First Amendment's ban on laws prohibiting the free exercise of religion is to be construed broadly to include within its prohibition laws permitting the exercise of religion only on the suffering of a financial loss. It is the free, not the purchased exercise of religion that is protected by the Amendment. The financial sanction imposed by a state for observing a day other than Sunday as holy time is certainly more serious economically than the imposition of a license tax

for preaching, which this Court has twice held to be an unconstitutional restriction on religious liberty. *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *Town of McCormick*, 321 U. S. 573.

In large measure the history of the free exercise of religion clause of the First Amendment is a history of the struggle to be free of economic sanctions for adherence to one's religion. Direct penal compulsion to adhere to certain religious beliefs or to transgress others had practically completely disappeared by the time the First Amendment to the Constitution was written. "Compulsory attendance upon religious exercises," said Mr. Justice Rutledge in *Everson*, (330 U. S. 1, 44), "went out early in the process of separating church and state". The struggle for religious liberty when the Bill of Rights was adopted was substantially a struggle against taxation for religious purposes.

As pointed out in *Everson*, (*ibid*, at 11-14), the First Amendment's guarantee of separation of church and state and of religious liberty grew out of the successful struggle in Virginia to defeat a measure seeking to impose a small tax for religious education. Defeat of the measure was followed speedily by the enactment of Jefferson's immortal statute for religious freedom. That statute provided that it was sinful and tyrannical to compel a man to furnish contributions for the propagation of opinions which he disbelieves and abhors and that it was also wrong to force him to support this or that teacher of his own religious persuasions. The statute, in language which is particularly appropriate here, stated: "That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, *nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall other-*

wise suffer on account of his religious opinions or beliefs, but that all men shall be free to profess and by argument to maintain their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities." (Emphasis added.)

Enactment of the Virginia statute was followed within five years by the adoption of the First Amendment. In *Reynolds v. United States*, 98 U. S. 145, 164, and *Davis v. Beason*, 133 U. S. 333, 342, as well as in the *Everson* case, this Court recognized that the history of the struggle in Virginia is part of the legislative history of the First Amendment.

We submit, therefore, that both the history of the Amendment and the decisions of this Court leave no doubt that governmental imposition of economic sanctions on the practice of religion constitutes an infringement upon its free exercise which, unless justified, violates the Amendment.

Nor, we submit, is it material that the economic sanction is indirect rather than direct, i.e., no fine is imposed by either Massachusetts or Pennsylvania for a Sabbatarian's exercise of his privilege of refraining from secular affairs on Saturday. The decisions of this Court make no distinction between indirect and direct economic sanctions on the exercise of a right guaranteed by the First Amendment, so long as the causal connection is clear. The various decisions on statutes seeking to bar subversives from government employment or from particular private industries or professions all are illustrations of indirect restrictions upon the exercise of First Amendment rights. For example, in *American Communications Association v. Douds*, 339 U. S. 382, which upheld "the non-Communist

oath" required by the Taft Hartley Act, there was no criminal penalty or direct economic sanction imposed upon membership in a subversive organization. The sole consequence of such membership was the indirect one of disqualification for holding office in a labor union seeking the benefits of the Labor Relations Act. Nevertheless, this Court recognized that, except for the overriding need to protect interstate commerce from political strikes, the provision would have constituted an unconstitutional infringement upon the freedom of association guaranteed by the First Amendment.

In *Adler* v. *Board of Education*, 342 U. S. 485, a similar holding was made in respect to a New York statute barring members of subversive organizations from employment as public school teachers. In *Speiser* v. *Randall*, 357 U. S. 513, this Court recognized that denial of tax exemption to persons and organizations advocating the overthrow of the government by force and violence may constitute an infringement upon their freedom of speech under the First Amendment.

Numerous similar instances can be cited.[2] They all point clearly to the conclusion that the fact that the economic sanction imposed for the exercise of the First Amendment right is indirect in its application does not render the constitutional guarantee inapplicable. In all cases this Court has recognized the reality of the situation and has applied the constitutional guarantee in a mean-

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[2] E. g. *United States ex rel. Milwaukee Social Democratic Publishing Company* v. *Burleson*, 255 U. S. 407 (second class mailing privilege); *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716 (subversives barred from civil service); *Thomas* v. *Collins*, 323 U. S. 516 (registration of labor organizations); *United Public Workers of America* v. *Mitchell*, 330 U. S. 75 (Hatch Act).

ingful way. We submit that these decisions are applicable here and require determination that the statutes under attack in these cases infringe upon freedom of religion.

C. Religious Liberty and the States' Police Power

Of course, the fact that the assailed Sunday laws restrict religious liberty does not for that reason alone render them unconstitutional. There can be no doubt that the religious freedom guaranteed by the First Amendment to the Federal Constitution does not embrace absolute "freedom to act" and that all conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-304. Concededly, the First Amendment does not preclude proscription of polygamy, breaching the peace or child labor. *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Prince* v. *Massachusetts*, 321 U. S. 158. We may also concede that religious conviction in seven days' labor weekly would not render unconstitutional a statute requiring one day rest in seven. Cf. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (compulsory vaccination statute).

Nevertheless, the usual presumption of constitutionality supporting legislation is balanced in legislation regulating rights secured by the First Amendment, by "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530; *Marsh* v. *Alabama*, 326 U. S. 501, 509; *Prince* v. *Massachusetts*, 321 U. S. 158-164. Hence, any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."

Thomas v. *Collins*, 323 U. S. 516, 530. See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639.

It is not sufficient to establish that a clear and immediate danger exists. It must be established with equal clarity that the restriction imposed upon the rights guaranteed by the First Amendment is necessary to meet the danger. Ordinarily if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable. *United States* v. *Carolene Products*, 304 U. S. 144. But for legislation abridging a liberty secured by the First Amendment, a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins*, 323 U. S. 516, 530. "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96. See also, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639.

Measured by this standard, the assailed Sunday laws cannot stand as enforced against the parties herein. The danger which it purportedly seeks to avert are (1) the hazard to health resulting from uninterrupted labor, and (2) the prevention of interference with the basic religious

character of the day. But if practicable means exist to avert those dangers without infringing upon religious freedom, the First Amendment imposes upon the States of Massachusetts and Pennsylvania an obligation to avail themselves of those means. The evils against which the statutes here in issue are purportedly aimed can readily and easily be averted without restricting the religious liberty of persons observing a day other than Sunday as holy time. As to the health hazard, two simple methods are available: either a simple one-day rest in seven statute applicable to all persons, as Massachusetts G. L., Chapter 149, §48, is made applicable to employees, or a provision in the Sunday law itself exempting from its operation those who observe another day as their religious day of rest. The existence of §48 of Chapter 149 is adequate evidence that the former method is practicable. That the second method is practicable is evidenced by the various State statutes that do contain or have been interpreted to contain such an exemption. (General Statutes of Connecticut, Revision of 1949, §8609; Illinois Smith-Hurd Annotated Statutes, Chapter 38, §549; Burns Indiana Statutes (1933) Chapter 43, §10-4301; Iowa Code Annotated, Chapter 729, §1; Kentucky Statutes of 1903, 436, 150; Maine Laws, Chapter 121 §36; Michigan Statutes, Volume 13, §18.855; Page's Ohio General Code Annotated, §130.5; Oklahoma Statutes 1951, Title 21, §909, as construed in *Krieger* v. *State*, 12 Okla. Cr. 566, 160 Pac. 36; *State* v. *Cheaney*, 29 Okla. Cr. 251, 233 Pac. 236; West Virginia Code of 1943, Annotated, §6073; Wisconsin Statutes, §351.52).

Nor can it be successfully urged that Sunday must be designated the day of rest for all persons because permitting a minority to engage in their usual occupations

would disturb the repose of the majority, who observe Sunday as their day of rest, and thereby interfere with the basic religious character of the day. This Court can judicially note that the retail sale of food involved in the Massachusetts suit is far less likely to disturb the peace and repose of the neighborhood than the numerous professional sports permitted by §21-32 of the Massachusetts statute. In any event, the objection can be met by the simple expedient of conditioning the exemption upon operating in such manner as not to interrupt or disturb others in their observance of Sunday as a day of rest.

We submit, therefore, that the evil which the Massachusetts and Pennsylvania Legislatures purportedly seek to avert can be practicably avoided without infringing upon the religious liberty of Christians and Jews who observe Saturday as their holy day of rest. It follows, therefore, that the statutes here in issue are unconstitutional at least as to these Christians and Jews.

III. Because of the complete irrationality of their inclusions and exclusions, the Massachusetts and Pennsylvania Sunday laws constitute deprivations of liberty and property without due process of law and denials of the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution.

A. The Requirement of Equality

Even if the Sunday laws here in issue are deemed an exercise of the States' police power for the protection of the citizens' health, they are nevertheless unconstitutional if, without justification, they operate unequally or discriminatorily. The inhibition of the Fourteenth Amendment that

no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminatory and hostile legislation. *McPherson* v. *Blacker*, 146 U. S. 1, 39. The States' police power must be exercised consistently with the "equal protection" clause. *Skinner* v. *Oklahoma*, 316 U. S. 535.

Concededly, the guaranty of equal protection does not preclude legislative classification. *Goesaert* v. *Cleary*, 335 U. S. 464; Trussman and Ten Broek, "The Equal Protection of the Laws," 37 *Calif. L. Rev.* 341, 348. Moreover, we may also concede broad discretion to the Legislature in arriving at a classification. *Borden's Farm Products, Inc.* v. *Baldwin*, 293 U. S. 194. Nevertheless, some reasonable basis for a legislative classification must appear. *Jones* v. *Union Guano Co.*, 264 U. S. 171; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150. Legislative inclusion and exclusion which rests exclusively upon caprice does not satisfy the constitutional requirement of equality. *Binney* v. *Long*, 299 U. S. 280; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422; *Morey* v. *Doud*, 354 U. S. 457, 466.

Capricious classifications affecting the livelihood of citizens constitutes not only a denial of the equal protection of the laws but likewise a deprivation of liberty and property without due process of law. *Meyer* v. *Nebraska*, 262 U. S. 390; *Pierce* v. *Society of Sisters*, 268 U. S. 510. The due process clause precludes arbitrariness by government.

B. The Inequality of the Sunday Laws

No matter how generous the courts may be in respecting legislative classifications, some semblance of rationality must be present in the statutory scheme to sustain the law, else the courts abandon the responsibility imposed upon them by the Fourteenth Amendment. No such semblance of rationality can be found in the statutes here in issue. As far as we can see, nothing but caprice can adequately explain the inclusions and exclusions of the laws. Specifically, we urge that inclusion of a retail food market such as that operated by the plaintiffs in the Massachusetts case, and the retail stores in the Pennsylvania case cannot be justified by any considerations entitled to judicial acceptance.

What reason can lie behind a law which, as the Massachusetts statute does, permits the sale of tobacco on Sunday but prohibits the sale of foods? Why should it be possible to sell confectionary on the Lord's Day but not meat? Is it less tiring to sell gasoline and oil than it is to sell lamb chops that the former should be allowed and the latter forbidden? Why should the wholesale disposition of fish be lawful and the retail disposition of the same fish unlawful? Why should a bootblack be permitted to ply his trade on Sunday before 11 A.M. but a barber not at all?

The test cannot be that of importance to the community, for it can hardly be said that it is more important to attend a professional football game than to have one's hair cut. The test cannot be that of disturbance of the rest and repose of the community, for retail selling of foods, which is prohibited, certainly does not disturb the neighborhood's rest and repose more than a baseball double-header, which

is permitted. If the sale of "frozen desserts and/or frozen dessert mix" is allowed on the ground that they are perishable, why is the sale of even more perishable uncooked meat forbidden? Why should it be licit to make butter and cheese on Sunday but illicit to sell it? What justification can explain a statutory distinction between "unpaid work on pleasure boats" and equally unpaid work on pleasure land vehicles? Is there any rationality in a statute that permits the retail sale of tobacco products by newsdealers "whose stores are open for the sale of newspapers every day of the week," but not by those who keep their stores closed some day of the week in order to get the rest and repose which it is the purported purpose of the statute to insure?

What is true of Massachusetts is equally true of Pennsylvania. There may be some variations in the inclusions and exclusions but the pattern—or, more accurately, absence of pattern—is the same. In *Commonwealth* v. *Cavalerro* (decided April 20, 1960) Judge Alexander in the Quarter Sessions Court of Philadelphia, described the operation of the Pennsylvania statute as follows:

> This law forbids a clerk to sell to my blind neighbor a Dylan Thomas recording, but does not prohibit the same clerk from selling me a book containing exactly the same poems from the next counter. Side by side in Bargain City and many other stores are tricycles, which cannot be sold to me for my two-year old granddaughter because they are toys, and adult bicycles which I can buy for myself or for my daughter just out of her teens. A clerk may sell me seat covers for my automobile, but he cannot sell me slip covers for my sofa. If I have forgotton to shop for a birthday present for my wife during the week, the same store

may sell me on Sunday without violating this law a camera, ice skates or a dozen roses, but not a watch or a suitcase or a tie pin for myself. It cannot sell me a *toy* rubber football for the four-year old, but this law does not prohibit the sale of a football for the teenager, for one is a *toy* and the other is not, and *sporting goods* are not covered by this law.

These examples could be multiplied endlessly by anyone strolling through Bargain City, a department store or a drug store with a copy of the law in his hand and the law must be kept in hand or exactly memorized, because there is no intelligible logical principle by which one may determine what is excluded and what is included.

A number of State courts have recognized the caprice underlying compulsory Sunday observance laws with patterns far less reminiscent of crazy quilts than the Massachusetts and Pennsylvania Sunday law here in issue. In *Denver* v. *Bach*, 26 Colo. 530, a city ordinance which required certain types of retail stores to remain closed on Sunday and allowed others to remain open was declared arbitrary and unconstitutional. Some years later the Colorado Supreme Court invalidated a statewide Sunday law exempting certain enumerated forms of business and declared that the statute had "the vice of discriminating where there is no basis for discrimination". *Allen* v. *Colorado*, 101 Colo. 498.

In *Elliot* v. *State*, 29 Ariz. 389, the Court held that a law cannot constitutionally prohibit the engagement in some businesses on Sunday while allowing similar businesses to operate on that day.

In *Mt. Vernon* v. *Julian*, 369 Ill. 447, the Court considered the validity of a municipal Sunday closing ordinance

containing some, but far from all, of the exemptions contained in the law here in issue. Under that ordinance, hotels, restaurants or other eating places, drug stores, tobacco stores, confectionery stores, newsdealers, ice dealers and gasoline filling stations were exempt, while other businesses were not. "Under this ordinance," said the Court, "a bakery which sells bread must be closed but a shoe shining shop which sells cigars and newspapers is unaffected * * *. These distinctions appear to us to be entirely arbitrary without relation to the public health, safety, morals or welfare." The law was, therefore, struck down as violative of both the Federal and State Constitutions. Similar holdings are found in *Springfield* v. *Smith*, 322 Mo. 1129, 19 S. W. 2d 1; *Gestano Bocai and Sons Co.* v. *Lawndale*, 208 Cal. 720, 284 Pac. 654; *Ex Parte Ferguson*, 70 P. 2d 1094 (Okla. Ct. Cr. App.); *Ex Parte Hodges*, 83 P. 2d 201 (Okla. Ct. Cr. App.); *Kelly* v. *Blackburn*, 95 S. 2d 260 (Fla.); *Henderson* v. *Antonacci*, 62 S. 2d 5 (Fla.).

Gronlund v. *Salt Lake City*, 194 P. 2d 464 (Utah) involved a local ordinance of Salt Lake City which listed certain commodities which were excepted from the Sunday closing ordinance. The Court said:

> "* * * even bearing in mind the rule that the classification upon which a Sunday closing law is based is within the discretion of the legislative branch and hence will be upheld unless clearly arbitrary, it is difficult to conceive of a fair reason for some of the items excepted * * *. The classification being on a commodity basis, it is arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or * * * coffee." (p. 468)

We respectfully submit that no matter how liberal the term equality is construed, no matter how broad the Legis-

lature's discretion may be, the Massachusetts and Pennsylvania Sunday laws are so lacking in any appearance of rationality in respect to the distinction between activities permitted on Sunday and those prohibited and with respect to persons permitted to engage in business on Sunday and those forbidden to do so that they must be adjudicated completely arbitrary. Their enforcement, therefore, constitutes both a deprivation of liberty and property without due process of law and a denial of the equal protection of the laws.

Conclusion

For the reasons herein stated we respectfully submit that the decision in the Massachusetts case should be affirmed and the decision in the Pennsylvania case should be reversed.

Respectfully submitted,

LEO PFEFFER
15 East 84th Street,
New York 28, New York

Attorney for
Synagogue Council of America and National Community Relations Advisory Council
Amici Curiae

LEWIS H. WEINSTEIN
CHARLES P. KRAMER
MORTIMER BRENNER
SHAD POLIER
SAMUEL LAWRENCE BRENNGLASS
PHILIP JACOBSON

Of Counsel

Appendix

Massachusetts General Laws, Chapter 135, Observance of the Lord's Day

"Sec. 5. Keeping Open Shop, etc., and Doing Certain Work, etc., Prohibited.

Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars. (CL 133, Secs. 1, 2; 1692-3, 22, Sec. 1; 1716-7, 13, Sec. 1; 1727-8, 5, Secs. 1, 4; 1760-1, 20, Secs. 2, 9; 1782, 23, Sec. 1; 1791, 58, Sec. 1; 1796, 89, Sec. 1; RS 50, Sec. 1; GS 84, Sec. 1; 1862, 152; PS 98, Sec. 2; 1895, 434, Secs. 2, 4; RL 98, Secs. 2, 5; 1904, 460, Sec. 2; 1909, 423, Sec. 4; 1918, 257, Secs. 336, 338; 1919, 5; 1920, 2.)"

"Sec. 6. Limit of Operation of Preceding Section.

The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between

the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work

on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon; of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of

fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land; and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house as shall not cause unreasonable noise having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibition held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section 4A or section 4B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. (RS 50, Sec. 10; GS 84, Sec. 9; PS 98, Sec. 13; 1886, 82; 1887, 391, Sec. 2; 1893, 41; 1895, 434, Sec. 2; 1900, 440; 1901, 80; RL 98, Secs. 3, 4; 1902, 414, Sec. 1; 1908, 126, Sec. 1; 273, Sec. 1; 333; 343; 1909, 420, Sec. 2; 423, Sec. 5; 1910, 327; 1911, 328, Sec. 1; 1914, 757, Sec. 1; 1916, 146, Sec. 1; 1917, 207; 1927, 175; 1928, 234; 1929, 118; 1930, 143; 179; 1931, 240; 1932, 96; 1933, 150, Sec. 3; 1934, 328, Sec. 7; 1934, 354; 1934, 373, Sec. 6; 1936, 129; 1937, 286; 1938, 143; 1943, 473; 1946, 207, Sec. 4; 1949, 190; 1950, 56, Sec. 1; 1950, 322; 1950, 681; 1951, 504; 1954, 217; 1955, 304, apprvd. April 22, 1955; on the same day declared by the Governor to be an emergency law, effective therewith.)"

Pennsylvania Sunday Law

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense * * *" P. L. No. 212, 18 Purd. Pa. Stat. Ann. §4699.10.

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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 11.

RAYMOND P. GALLAGHER, CHIEF OF POLICE, OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL.,
Appellants,

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

EDWARD J. McCORMACK, JR.,
Attorney General of Massachusetts,
JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,
ARTHUR E. SUTHERLAND,
S. THOMAS MARTINELLI,
City Solicitor, Springfield,
Massachusetts,
JOHN WARREN McGARRY,
Assistant Attorney General,
Attorneys for Appellants.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

(A) A reference to the reports of the opinions delivered in the courts below 1

(B) A concise statement of the grounds on which the jurisdiction of the Supreme Court of the United States is invoked; and a citation to the statutory provision and the time factors upon which its jurisdiction rests 2

(C) The constitutional provisions and statutes which the case involves 2

(D) The questions here presented for review, expressed in the terms and circumstances of the case 4

A. Questions concerning standing of plaintiffs to sue, the statutory authority of the three-judge court to entertain the case, and the propriety of the exercise of jurisdiction if it exists 4

B. Questions concerning the effect of the Fourteenth Amendment in the terms and circumstances of this case 7

(E) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the printed record 8

(F) A summary of the argument made hereafter in the body of the brief 15

(G) The argument for appellants 22

a. Arguments concerning standing of plaintiffs to sue, statutory jurisdiction of the three-judge court, and the propriety of its exercise—Points I to V, inclusive 22

I. No one of the individual plaintiffs, Heafitz, Chaitovsky and Cohen, customers of Crown Kosher Super Market; nor the individual plaintiff, Rabbi Sheinkopf, has any legal interest in the application of chapter 136, Massachusetts General Laws, to the corporate plaintiff Super Market sufficient to give any such individual plaintiff standing as a party to the Federal injunction suit 22

II. No party, individual or corporate, has here any standing as a taxpayer 27

III. The Crown Kosher Super Market of Massachusetts, Inc., has no religion; it has no standing to assert impairment of religious freedom 28

IV. The three-judge court below should have granted the motion to dismiss on the ground that Section 2281 of Title 28, United States Code, gives a three-judge court no jurisdiction to enjoin a purely local officer, as distinguished from an officer of the State 32

V. Assuming without conceding that there was statutory jurisdiction in the three-judge court below, that court should not have exercised jurisdiction herein 33

b. Arguments concerning the effect of the Fourteenth Amendment in the terms and circumstances of this case—Points VI-A to VI-F. inclusive 43

VI-A. The Massachusetts Sunday laws, now General Laws, chapter 136, despite religious impulses in their ancient antecedents, by passage of time have become a system of lay

economic and social regulation, providing a uniform day of rest and recreation in each week; their constitutionality should be judged with the same presumption of validity as other social and economic legislation; so judged the legislation here questioned is clearly valid 43

VI-B. Saturday sabbatarian closing is not imposed by State action; its consequences do not call into effect the Fourteenth Amendment 54

VI-C. The United States Supreme Court, affirming or dismissing appeals from a long series of lower court cases upholding the Sunday closing laws of many States, has recognized their character as social and economic legislation, and has consistently rejected arguments that such legislation is unconstitutional, either on religious freedom grounds, or on grounds of equal protection and due process 56

VI-D. The Sunday closing legislation in Massachusetts, General Laws, chapter 136, as applied to defendant Crown Kosher Super Market of Massachusetts, Inc., is not unreasonable, in classification or otherwise, and does not contravene the equal protection or due process clauses; the wide adoption of such legislation in the various States and elsewhere, and its constitutional approval by the vast majority of State courts, so demonstrates 65

VI-E. The facts, as established by testimony or stipulation, do not show unconstitutionality of Massachusetts Sunday closing laws as applied to any plaintiff 76

VI-F. The decree herein is not justified by the opinion of the three-judge district court 77

Conclusion 78

Appendix A 80

Massachusetts General Laws, chapter 136, 80

Appendix B 97

Introduction 97

Explanation of table of State Sunday closing legislation and adjudication 97

Recent Law Review notes on Sunday closing statutes 100

State Sunday closing legislation and adjudication tabulated 101

Table of Authorities Cited.

Cases.

Allen v. City of Colorado Springs, 101 Colo. 498, 75 P. 2d 141 74*n*

American Surety Co. v. Baldwin, 287 U.S. 156 38

Andrews, Ex parte, 18 Cal. 678 47, 48, 71

Armstrong v. State, 170 Ind. 188, 84 N.E. 3 72*n*

Arrigo v. City of Lincoln, 154 Neb. 537, 48 N.W. 2d 643 74*n*

Bargaintown, U.S.A., Inc., v. Whitman, U.S. Sup. Ct. No. 76, Appellate Docket, October, 1960 14

Barrows v. Jackson, 346 U.S. 249 24, 25

Baskin v. Industrial Accident Commission, 338 U.S. 854 62

Boynton v. Fox West Coast Theatres Corp., 60 F. 2d 851 18, 39, 42

Braunfeld v. Gibbons, U.S. Sup. Ct. No. 67, Appellate Docket, October, 1960 14

Broad-Grace Arcade Corp. v. Bright, 48 F. 2d 348; affirmed, 284 U.S. 588 49, 59

Browder v. Gayle, 142 F. Supp. 707; affirmed, 352 U.S. 903; petition for clarification and rehearing denied, 352 U.S. 950 17, 23

Brunswick-Balke-Collender Co. v. Evans, 228 Fed. 991; appeal dismissed, 248 U.S. 587 64

Central Union Telephone Co. v. City of Edwardsville, 269 U.S. 190 42

Cleveland v. Bowers, 349 U.S. 143 46

Coleman v. Miller, 307 U.S. 433 28

Collins, Ex parte, 277 U.S. 565 5

Commonwealth v. Cavalerro, Court of Quarter Sessions, Philadelphia County, Pa., April 20, 1960, apparently unreported 71

Commonwealth v. Chernock, 336 Mass. 384, 145 N.E. 2d 920 6, 10, 34, 37, 45

Commonwealth v. Dextra, 143 Mass. 28, 8 N.E. 756 45

Commonwealth v. Has, 122 Mass. 40 7, 43, 45, 46, 47

Commonwealth v. Starr, 144 Mass. 359, 11 N.E. 533 45

Commonwealth of Pennsylvania v. Grochowiak, 184 Pa. Super. 522, 136 A. 2d 145; appeal dismissed, 358 U.S. 47 64

Cromwell v. County of Sac, 94 U.S. 351 38

Crown Kosher Super Market, Inc., v. Gallagher, 176 F. Supp. 466; 178 F. Supp. 336 1 et seq.

Doremus v. Board of Education of the Borough of Hawthorne, 342 U.S. 429 16, 26, 28

Douglas v. City of Jeannette, 319 U.S. 157 18, 38
Elliott v. State, 29 Ariz. 389, 242 P. 340 71*n*
Erie Railroad Co. v. Tompkins, 304 U.S. 64 46
Friedman v. People of New York (see People v. Friedman)
Goesaert v. Cleary, 335 U.S. 464 52
Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 38
Gundaker Central Motors, Inc., v. Gassert, 23 N.J. 1, 127 A. 2d 566; appeal dismissed, 354 U.S. 935 63
Hague v. Committee for Industrial Organization, 307 U.S. 496 29
Harrison v. National Association for the Advancement of Colored People, 360 U.S. 167 22, 38
Henderson v. Antonacci, 62 So. 2d 5 72*n*, 74*n*
Hennington v. Georgia, 163 U.S. 299 48, 57
Hodges, Ex parte, 83 P. 2d 201 74*n*
Humphrey Chevrolet, Inc., v. City of Evanston, 7 Ill. 2d 402, 131 N.E. 2d 70 30
Kelly v. Blackburn, 95 So. 2d 260 72*n*
Kissinger v. United States, 250 F. 2d 940; certiorari denied, 356 U.S. 955 55, 56
Kotch v. Board of River Port Pilot Commissioners for the Port of New Orleans, 330 U.S. 552 53
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 52
Lochner v. New York, 198 U.S. 45 51
McGowan v. Maryland, 22 Md. 123, 151 A. 2d 156 14
McKaig v. Kansas City, 363 Mo. 1033, 256 S.W. 2d 815 72*n*
Muller v. Oregon, 208 U.S. 412 20, 65

Mt. Vernon, City of, v. Julian, 369 Ill. 447, 17 N.E. 2d 52 74*n*

Nebbia v. New York, 291 U.S. 502 51

Newman, Ex parte, 9 Cal. 502 71

New York City v. Central Savings Bank, 306 U.S. 661 75

Ohio, ex rel. Eaton v. Price, 360 U.S. 246 62

Osborn v. Ozlin, 310 U.S. 53 54

Pearl Assurance Co. v. Harrington, 38 F. Supp. 411; affirmed, 313 U.S. 549 24

People v. Friedman, 302 N.Y. 75; 96 N.E. 2d 184; affirmed, 341 U.S. 907 37, 60, 62, 73, 76, 77, 78

People v. Havnor, 149 N.Y. 195, 43 N.E. 541; writ of error dismissed, 170 U.S. 408 64

Petit v. Minnesota, 177 U.S. 164 59

Pierce v. Society of Sisters, 268 U.S. 510 24, 29

Public National Bank of New York, Ex parte, 278 U.S. 101 5, 17, 32

Railway Express Agency, Inc., v. New York, 336 U.S. 106 53

Sarner v. Union Township, Union County, 55 N.J. Super. 523, 151 A. 2d 208 72*n*

Schempp v. Abingtown Township, 177 F. Supp. 398 26

Selover, Bates & Co. v. Walsh, 226 U.S. 112 29

Smith v. Cahoon, 283 U.S. 553 74

Society for Savings in the City of Cleveland v. Bowers, 349 U.S. 143 46

Soon Hing v. Crowley, 113 U.S. 703 57

Speilman Motor Sales Co. v. Dodge, 295 U.S. 89 5

Springfield, City of, v. Smith, 322 Mo. 1129, 19 S.W. 2d 1 74n

State v. Kidd, 167 Ohio State 521, 150 N.E. 2d 413; appeal dismissed, 358 U.S. 132 63

State v. McGee, 237 N.C. 633, 75 S.E. 2d 783; appeal dismissed, 346 U.S. 802 63

State v. Towery, 239 N.C. 274, 79 S.E. 2d 513; appeal dismissed, 347 U.S. 925 63

Tileston v. Ullman, 318 U.S. 44 25

Two Guys from Harrison-Allentown, Inc., v. McGinley, 179 F. Supp. 944 14, 62, 76

United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 23

United States v. Ellicott, 223 U.S. 524 2

West Coast Hotel Co. v. Parrish, 300 U.S. 379 51

West Virginia State Board of Education v. Barnette, 319 U.S. 624 23, 31

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 53

STATUTES, ETC.

United States Constitution, Art. I, sec. 7, cl. 2 67

United States Constitution, Commerce Clause 39, 48, 57

United States Constitution, First Amendment 2, 5, 37, 55, 61, 62

United States Constitution, Fourteenth Amendment 2, 3, 5, 7, 8, 15, 18, 19, 29, 31, 39, 43, 47, 50, 51, 52, 54, 59, 61, 62, 64, 65, 69

Massachusetts Constitution, Eleventh Amendment 7, 43

Massachusetts Constitution, Amendment LIX of 1918 31

21 U.S.C. 71, Federal Meat Inspection Act 54
28 U.S.C. 1253 2
28 U.S.C. 2101(b) 2
28 U.S.C. 2281 3, 5, 16, 17, 32
28 U.S.C. 2284 17
Omnibus Senate Order 657 of 1959 45
Florida 1959 Laws, c. 59-295, Regular Session, 37th Legislature 72*n*, 75
Massachusetts G.L. (Ter. Ed.) c. 94, sec. 118 *et seq.* 53
Massachusetts G.L. (Ter. Ed.) c. 94, secs. 127, 129, 130, 147 53, 54
Massachusetts G.L. (Ter. Ed.) c. 136 4, 8, 10, 13, 22, 38, 43, 65
Sec. 2 67
Sec. 3 67
Sec. 5 3, 9, 10, 11, 13, 67, 68, 77
Sec. 6 3, 5, 9, 10, 11, 53, 54, 68
Massachusetts G.L. (Ter. Ed.) c. 149, sec. 48 49
Massachusetts G.L. (Ter. Ed.) c. 155, sec. 3 30
Massachusetts, Lawes and Libertyes of the Massachusets (1647), sub tit. "Fyre" 3
Massachusetts, New Plymouth Laws (1672), c. VII, sec. 13 3
New York, Penal Law, Art. 192-Sabbath 60
Uniform Negotiable Instruments Law, sec. 85 66

MISCELLANEOUS.

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Holmested, The Sunday Law in Canada (1912) 70

Horn, A. M., "Judicial Power over Policy under State Constitutions" 72

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Pravda, October 1, 1929 50

VI Public Policy, Galbraith and Friedrich, Eds., 1956 72

32 Rocky Mountain Law Review, 243, 245 (1960) 71

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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 11.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, FOSTER FURCOLO, GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS AND EDWARD J. McCORMACK, JR., ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellants,*

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., IRVING HEAFITZ, MORRIS CHAITOVSKY, RUTH B. COHEN, AND RABBI MOSES D. SHEINKOPF, *Appellees.*

BRIEF FOR APPELLANTS.

(A) A Reference to the Reports of the Opinions Delivered in the Courts Below.

Crown Kosher Super Market, Inc., v. *Gallagher*, 176 F. Supp. 466; 178 F. Supp. 336 (D. Mass. 1959); Record, page 133 *et seq.*, and Record Supplement, page 191 *et seq.*

(B) A Concise Statement of the Grounds on which the Jurisdiction of the Supreme Court of the United States is Invoked; and a Citation to the Statutory Provision and the Time Factors upon which its Jurisdiction Rests.

The appellants here come to the Supreme Court of the United States pursuant to section 1253 of Title 28, United States Code. A notice of appeal herein was served upon the attorneys of record of the several parties by depositing the notice in the United States post office, properly addressed to the offices of those attorneys, postpaid by first-class postage, on the 18th day of September, 1959. The notice of appeal was, on the same day, duly filed in the office of the clerk of the District Court of the District of Massachusetts. Service and filing of the notice of appeal was accomplished within sixty days from the denial of the defendant's motion for a new trial on July 20, 1959; this was timely action under Title 28, United States Code, section 2101(b). *United States* v. *Ellicott*, 223 U.S. 524 (1912). The Governor of the Commonwealth and the Attorney General, who had appeared in the action because of the Commonwealth's interest in enforcing its statutes (Record, pages 4, 33, 47), joined in the appeal.

(C) The Constitutional Provisions and Statutes which the Case Involves.

The plaintiffs below, here appellees, successfully contended in the three-judge District Court that certain Massachusetts Sunday closing legislation, as applied to them, is invalid under the First and Fourteenth Amendments. The appellants contend that the only constitutional provi-

sion which has relevance is the second sentence of the first section of the Fourteenth Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Massachusetts legislative enactments which the plaintiffs in their complaint allege to be unconstitutional are Massachusetts General Laws (Tercentenary Edition), chapter 136, sections 5-6 (complaint, paragraph 4; Record, page 12). Chapter 136 is entitled: "Observance of the Lord's Day." (The expression "The Lord's Day" has been used in Massachusetts Sunday legislation since 1647. See Lawes and Libertyes of the Massachusets (1647), *sub* tit. "Fyre"; and see New Plymouth Laws (1672), chapter VII, section 13.) The text of chapter 136, General Laws, is appended to this brief, page 80 and following, as Appendix A.

The three-judge court founded its jurisdiction below on Title 28, United States Code, section 2281, the text of which is:

> "§ 2281. *Injunction against enforcement of State statute; three-judge court required.*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge

thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

(D) The Questions Here Presented for Review, Expressed in the Terms and Circumstances of the Case.

A. QUESTIONS CONCERNING STANDING OF PLAINTIFFS TO SUE, THE STATUTORY AUTHORITY OF THE THREE-JUDGE COURT TO ENTERTAIN THE CASE, AND THE PROPRIETY OF THE EXERCISE OF JURISDICTION IF IT EXISTS.

(1) Do plaintiffs Heafitz, Chaitovsky and Cohen, three individual persons of orthodox Jewish faith, customers of the corporate plaintiff, show sufficient injury to them to sustain their joinder as plaintiffs herein, by showing that Harold Chernock, doing business as Crown Kosher Super Market of Massachusetts, Inc., has been prosecuted criminally under chapter 136, Massachusetts General Laws; and that further similar prosecutions of him and persons associated in business with him are likely, there being no threat of prosecution of Heafitz, Chaitovsky or Cohen, or of any other customers? Has Rabbi Sheinkopf, Rabbi of a Jewish congregation in Western Massachusetts, such an interest and standing, he not being faced with any prosecution under such laws?

(2) Has any party plaintiff, individual or corporate, any standing to sue in a Federal court as taxpayer, there being no showing of any State expenditure ascribable to enforcement of any Sunday law, and no showing that the jurisdictional amount, or any sum whatever ascribable to chapter 136, Massachusetts General Laws, was required of any plaintiff?

(3) Has Crown Kosher Super Market of Massachusetts, Inc., a business corporation chartered by the Commonwealth, any standing to assert "freedom of religion" under the First or Fourteenth Amendments?

(4) Did the three-judge court below have jurisdiction under the provisions of Title 28, United States Code, section 2281, to enjoin the Chief of Police of the City of Springfield, Massachusetts, from enforcing a State criminal statute, the Chief being neither "any officer of such State" nor "an administrative board or commission acting under" the State statute? *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935). *Ex parte Collins*, 277 U.S. 565 (1928). *Ex parte Public National Bank of New York*, 278 U.S. 101 (1928).

(5) Assuming, without concession of correctness, that under the Federal statutes the three-judge court did have jurisdiction to issue a decree against Chief Gallagher, was it lawful or proper for the three-judge court, under the circumstances here described, to issue the injunction below? This question is presented, among other "circumstances of the case," in connection with two preceding litigations, both in Massachusetts State courts, one criminal, one civil.

(*a*) *The criminal prosecution in the Massachusetts State courts.*

The Commonwealth of Massachusetts in 1954 prosecuted in its courts "Harold Chernock doing business as Crown Market" for a violation of section 6 of chapter 136 of the General Laws of Massachusetts as amended. "Crown Market" is the same as the Crown Kosher Super Market of Massachusetts, Inc., corporate plaintiff in the present suit (see the answer herein, paragraph 5, Record, page 37, and the com-

plaint in the criminal prosecution set forth in 176 F. Supp. 503, Record Supplement, page 193, and the other proceedings in that prosecution at the pages following that complaint). In defending that prosecution "Harold Chernock, doing business as the Crown Market," could have asserted all Federal constitutional questions here asserted. The Supreme Judicial Court of Massachusetts affirmed Mr. Chernock's conviction in that criminal proceeding. *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N.E. 2d 920 (1957). Mr. Chernock made no effort to obtain review of that judgment in the Supreme Court of the United States. The time for any such application or effort has long since expired.

(*b*) *The injunction suit in the Massachusetts State courts.*

On June 18, 1954, the corporate plaintiff in the present Federal case, describing itself as "Crown Kosher Super Market of Mass., Inc., alias Harold Chernock d/b/a Crown Market," as petitioner, filed a bill of complaint in the Superior Court of the Commonwealth of Massachusetts against "Raymond P. Gallagher in his position of Chief of Police of the City of Springfield, Massachusetts." (See the answer herein, paragraph 8, Record, page 39.) In that complaint in the State injunction action the corporate plaintiff, here also corporate plaintiff, described itself as "also known as Harold Chernock d/b/a Crown Market"; it recited that "the petitioner" was "found guilty and fined $15.00" on June 15, 1954 (see papers in the State court injunction action set forth in 176 F. Supp. 495, Record Supplement, page 216). This recital refers to the same criminal conviction referred to in subpara-

graph (*a*) immediately above (see a certificate of the clerk of the District Court of Springfield, Massachusetts, set forth 176 F. Supp 507, Record Supplement, pages 194, 195). In the State injunction action the corporate plaintiff obtained a temporary injunction against further criminal prosecutions. After the present action was started, on the consent of the corporate plaintiff the State injunction suit was ended by a "Final Decree Dismissing Bill" (see 176 F. Supp. 501, Record Supplement, page 224). In that State suit the corporate plaintiff could have raised all the issues here raised, with equal standing or lack of standing. In view of these previous proceedings, which afforded a full opportunity to litigate all questions of Federal constitutionality, should the three-judge court have enjoined the defendant in the case at bar?

B. QUESTIONS CONCERNING THE EFFECT OF THE FOURTEENTH AMENDMENT IN THE TERMS AND CIRCUMSTANCES OF THIS CASE.

(6)-(a) As the Massachusetts Supreme Judicial Court, rejecting a "freedom of religion" argument under the Eleventh Amendment of the State Constitution, has held that the Sunday laws of the Commonwealth constitute ". . . a civil regulation, providing for a fixed period of rest . . . derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare" (*Commonwealth* v. *Has*, 122 Mass. 40 (1877)), did the three-judge court below err in failing to apply this statute as it would any other State statute regulating the times when various types of business activity can be carried on, with exceptions which the Legisla-

ture has determined to be beneficial to the people of the Commonwealth?

(6)-(b) Does any provision of chapter 136, General Laws of Massachusetts, deny to any party entitled to standing in the court below any Federal constitutional right in the nature of freedom of religion?

(6)-(c) Does any provision of chapter 136, Massachusetts General Laws, deprive Crown Kosher Super Market of Massachusetts, Inc., or any other party entitled to standing in court, if such there be, of any Federal constitutional right, under the Fourteenth Amendment or other? Specifically, does it deny "economic due process" or deny equal economic protection of the laws, or any privilege or immunity under the Constitution of the United States?

(6)-(d) Was the evidence submitted to the three-judge court sufficient to sustain its findings of fact and conclusions of law as expressed in the opinion of its majority of judges?

(6)-(e) Was the decree finally entered consistent with, and justified by, the findings of fact and conclusions of law, insofar as these were sustainable by the record below?

(E) A Concise Statement of the Case Containing All that is Material to the Consideration of the Questions Presented, with Appropriate References to the Printed Record.

This action for declaration of unconstitutionality of certain Massachusetts "Sunday Closing Laws," and for an injunction against their enforcement, was instituted in the United States District Court for the District of Massachusetts by the filing of a complaint on May 1, 1958 (Record, page 12 *et seq.*). The corporate plaintiff is chartered as

a business corporation under the laws of Massachusetts (see the certificate of incorporation, set forth 176 F. Supp. 509, Record Supplement, page 201). It operates a super market in Springfield in that Commonwealth. Its president, general manager and "50 per cent owner of the business" is Harold Chernock (see Mr. Chernock's testimony, Record, pages 99, 104). It sells food, including some non-kosher food, on Sunday and on every other day in the week except Saturday, to any persons who present themselves as customers, regardless of religion (Record, page 125). The individual plaintiffs, Heafitz, Chaitovsky and Cohen, are orthodox Jewish customers of the corporate plaintiff who require kosher food by reason of their religious convictions. They claim to be situated similarly to many other orthodox Jewish customers of Crown Market (paragraphs 15 and 16 of the complaint, Record, pages 14, 15). The individual plaintiff, Rabbi Sheinkopf, complains "on behalf and at the request of" approximately fifty orthodox Rabbis of Massachusetts that he is "charged with the duty of seeing that the orthodox Jews in the Springfield area have foods prepared in accordance with the laws of Kashruth available to them" (Record, page 15).

On June 13, 1958, plaintiffs moved to amend the complaint by adding an allegation that all plaintiffs pay taxes to Massachusetts and portions of those taxes are used to enforce Massachusetts General Laws, chapter 136, section 5 (Record, page 35).

The defendant Gallagher is Chief of Police of the City of Springfield and is charged with enforcing Massachusetts General Laws, chapter 136, sections 5-6, as amended. The complaint alleges that Chief Gallagher has arrested and prosecuted the manager of Crown Market for keeping the store open on Sunday (paragraph 20, Record, page 15). The complaint further states (paragraph 21, Rec-

ord, page 16) that sections 5 and 6 of chapter 136 establish "Sunday as the Lord's day contrary to the religion of the Plaintiffs"; that the orthodox Jewish customers of the Crown Market cannot supply their religious dietary needs with the store closed on Sunday; that the plaintiff Rabbi Sheinkopf and the other rabbis he undertakes to represent, cannot fulfill their religious duties if the stores selling kosher foods are closed under chapter 136; that the corporate plaintiff, obliged by law to keep its market closed on Sunday, also keeps its market closed on Saturday "because of the religious belief of its stockholders, officers, and employees and customers." The corporate market complains, therefore, that it is placed in a competitive disadvantage relative to markets which need be closed only on Sunday. It also complains that other stores and vendors can, under chapter 136, sell numerous food products on Sunday, "much of which is neither necessary nor in keeping with the Lord's day, while forbidding the sale, in said Plaintiff's store, of food products having a religious significance" (paragraph 21E, Record, page 17).

The complaint prayed that the action be heard by a three-judge Federal court; that the court adjudge sections 5 and 6 of chapter 136 of Massachusetts General Laws unconstitutional, void and unenforceable as applied to the plaintiffs; and that the court issue a preliminary and a final injunction against the defendant in his official capacity "and all other Massachusetts and local authorities who would have any authority to take any action toward the enforcement of said laws" (Record, page 18).

The answer of Chief Gallagher admitted his authority to enforce State laws; and recited the arrest, prosecution, and convictions of "Harold Chernock, the manager of the Crown Market," and affirmance by the Supreme Judicial Court of the Commonwealth in the case entitled *Common-*

wealth v. *Chernock* (which is the same prosecution recited in the copies of the official papers therein, 176 F. Supp. 503-520, Record Supplement, pages 191-215). The answer further recited (paragraph 7, Record, page 38) that Crown Kosher Super Market of Mass., Inc., sought injunctive relief against the defendant from prosecution under General Laws, chapter 136, sections 5 and 6, by a bill in equity filed in the Hampden County Superior Court of the Commonwealth of Massachusetts, and that an interlocutory decree was rendered in that action against Chief Gallagher on June 25, 1954, which was still continuing in effect on the date of filing the answer.

The petition in that State court injunction action, No. 81,716 (set forth at 176 F. Supp. 495, Record Supplement, pages 216-218), recites as petitioner "Crown Kosher Super Market of Massachusetts, Inc. a corporation . . . also known as Harold Chernock d/b/a Crown Market." It recites that on June 15, 1954, "the petitioner" was prosecuted, found guilty and fined $15 on each of three complaints of violations of chapter 136, of the General Laws. The petition then prayed for a preliminary injunction enjoining the Chief of Police of the City of Springfield from "causing to be served further complaints upon the petitioner until such time as the question of so-called 'Sunday Law' violations on the part of the petitioners' market shall have been decided on appeal" (see 176 F. Supp. 495-496, Record Supplement, page 217). As the answer herein recites, the injunction so issued by the Massachusetts Superior Court continued in effect until after the present Federal injunction suit had been commenced, which occurred May, 1958. In the Massachusetts State court injunction action, Equity No. 81,716, the defendant, Chief of Police Gallagher, appeared by counsel. Some five months after the present Federal three-judge injunction action had been

started, on consent of the petitioner "Crown Kosher Super Market of Mass., Inc., alias Harold Chernock d/b/a Crown Market," but, as the final State decree indicates, without consent of the defendant therein, a final decree was entered dismissing the State court bill. That decree is set forth in 176 F. Supp. at page 501, Record Supplement, page 224.

The Federal injunction case then proceeded to trial on November 13, 1958, at Boston, Massachusetts, before Chief Judge Magruder, Circuit Judge Woodbury and District Judge McCarthy. The Governor of the Commonwealth and the Attorney General entered an appearance because of the interest of the Commonwealth in enforcing its statute (Record, pages 4, 33, 47). Facts were presented to the court, not only by stipulations of the parties (Record, page 40 *et seq.*), but also by the testimony of Mr. Harold Chernock (Record, pages 99-129).

In the course of an argument herein before the three-judge Federal court for dismissal, and later in the trial, counsel for the Commonwealth of Massachusetts and counsel for the plaintiffs discussed both the previous criminal case in the State courts and the previous state equity case, No. 81,716 (Record, pages 51 *et seq.*, 95, 114, 117, 128, 129).

Mr. Chernock took the stand as the only witness called on the plaintiffs' behalf. He testified that, in addition to kosher foods, he carried some other foods, though he testified that no other super market was open on Sunday in the Springfield area (Record, pages 123, 124). Asked: "How about yours?" he answered: "I am" (Record, page 124). With ready, unstudied use of the first person singular he identified his individual self with his corporate market. When asked how much of the Sunday business of the super market was done as a result of purchases by persons who are not orthodox Jews, Mr. Cher-

nock testified: "I don't believe there is—very, very little" (Record, page 124). When asked: "Do you make sales to persons, to anybody who's in this room?" he answered: "We don't discriminate. It would be bad business not to" (Record, page 125).

Following the trial Chief Judge Magruder delivered an opinion (176 F. Supp. 466, Record, page 133 *et seq.*), in which Circuit Judge Woodbury concurred, holding that—

> "all the objections which have been taken under the Fourteenth Amendment to the constitutionality of the statute in question are well taken."

The two prevailing judges directed that their opinion constitute their findings of fact and conclusions of law (176 F. Supp. 477, Record, page 148). District Judge McCarthy filed a dissenting opinion (176 F. Supp. 477, Record, page 149 *et seq.*). A petition for a rehearing was denied with a *per curiam* opinion on July 20, 1959 (176 F. Supp. 492, Record, page 179). District Judge McCarthy filed a dissent from the denial of a rehearing (178 F. Supp. 336, Record, page 184).

A decree, entered on June 12, 1959, declared chapter 136 of the Massachusetts General Laws, as amended, "unconstitutional, void, and unenforceable as applied to the plaintiffs in this action, in so far as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday," and enjoined Chief Gallagher from enforcing chapter 136, section 5, against the plaintiffs.

The present appeal followed. This Court noted probable jurisdiction on April 25, 1960, designating the case as No. 532 in the October, 1959, term. It is No. 11 on the October, 1960, Appellate Docket.

Other Sunday-closing cases now pending in the Supreme Court of the United States:

On April 25, 1960, this Court also noted probable jurisdiction in *McGowan v. Maryland*, then No. 438, now No. 8 on the October, 1960, Appellate Docket, reported below 22 Md. 123, 131 A. 2d 156 (1959), in which the Maryland Court of Appeals had affirmed a conviction of the defendants for selling merchandise in a store in violation of the Maryland Sunday closing laws.

On the same day this Court also noted probable jurisdiction in No. 699, *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley*, reported below in 179 F. Supp. 944 (D.C. E.D. Pa. 1959), in which a three-judge District Court, with an opinion by Circuit Judge Hastie, refused to enjoin enforcement of the Pennsylvania Sunday closing laws as applied to a suburban department store open every day of the week but doing about a third of its business on Sunday. The Court declined to follow *Crown Kosher Super Market* v. *Gallagher*, 176 F. Supp. 466 (D.C. D. Mass. 1959). *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley* is No. 36 on the October, 1960, Appellate Docket.

On May 23, 1960, the Supreme Court of the United States noted probable jurisdiction of the appeal of the plaintiff in *Braunfeld* v. *Gibbons*, then No. 845, now No. 67 on the October, 1960, Appellate Docket. This is an appeal from a judgment of the United States District Court, Eastern District of Pennsylvania, 28 U.S. Law Week 3310, 3346, upholding Pennsylvania's 1959 Sunday law. This case, like *Crown Kosher*, raises the issue of constitutionality of Sunday closing laws as applied to orthodox Hebrews; Fourteenth Amendment questions both of religion and classification are involved.

A fifth case is also pending in the Supreme Court of the United States, *Bargaintown, U.S.A., Inc.*, v. *Whitman*,

No. 891 on the October, 1959, calendar. On April 26, 1960, an appeal was filed by Bargaintown from a decree of the United States District Court for the Middle District of Pennsylvania upholding Pennsylvania Sunday legislation attacked on Fourteenth Amendment grounds involving both religious and classification questions, 28 U.S. Law Week 3334. When the Supreme Court adjourned at the end of June, 1960, no probable jurisdiction had as yet been noted. The case is No. 76 on the October, 1960, Appellate Docket.

(F) A Summary of the Argument Made Hereafter in the Body of the Brief.

(*a*) SUMMARY OF ARGUMENTS CONCERNING STANDING OF PLAINTIFFS TO SUE; THE STATUTORY AUTHORITY OF THE THREE-JUDGE COURT TO ENTERTAIN THE CASE; AND THE PROPRIETY OF THE EXERCISE OF ITS JURISDICTION—POINTS I TO V, INCLUSIVE.

I. The individual plaintiffs have no standing to sue. (Pages 22-27.)

No one of the individual plaintiffs, Heafitz, Chaitovsky and Cohen, customers of the plaintiff corporation, nor the individual plaintiff Rabbi Sheinkopf had sufficient standing to be heard as a plaintiff in the trial court. The Commonwealth of Massachusetts has shown no intention of prosecuting any of the individual defendants for disobedience of the Sunday laws (if, indeed, these laws make such prosecutions possible). The majority opinion below found prosecution of the individual defendants disallowed by State law (see 176 F. Supp. at page 471, Record, page 139). The relation of customers of the corporate plaintiff and of the Rabbi of their faith to the prosecution of

the corporation or its functionaries is too remote to sustain this litigation.

II. No party has standing to sue as a taxpayer. (Pages 27-28.)

No party hereto has standing to sue or to appeal as a taxpayer of the Commonwealth. There is no testimony on the record concerning any expense to the Commonwealth caused by enforcing the Sunday laws as applied to the plaintiff which would not have been incurred in the ordinary course of public administration in Massachusetts. See *Doremus* v. *Board of Education of the Borough of Hawthorne,* 342 U.S. 429 (1952). Nor was there any showing of any damage, in the jurisdictional amount (then $3000), or any other, accruing against the corporate or any other plaintiff, by reason of any Commonwealth tax whose proceeds defray any expense connected with the Sunday laws.

III. The corporate plaintiff has no standing to claim impaired freedom of religion. (Pages 28-31.)

A Massachusetts business corporation, such as Crown Kosher Super Market of Massachusetts, Inc., the corporate plaintiff herein, has no "religious belief" or "religious liberty," and had no standing in court to assert that its free exercise of religion was impaired. The corporate super market, if it has any grievance to assert, must rest on economic due process, or on a denial of equal economic protection.

IV. Title 28, United States Code, section 2281, gives a three-judge court no jurisdiction to enjoin a municipal officer. (Pages 32-33.)

The three-judge court below should have granted the defendant's motion to dismiss because the statute creat-

ing three-judge courts gives them no jurisdiction of actions against municipal, as distinguished from State, officials. Title 28, United States Code, section 2281. *Ex parte Public National Bank of New York*, 278 U.S. 101 (1928). *Browder* v. *Gayle*, 142 F. Supp. 707 (D.C. M.D. Ala. 1956); affirmed on motion, 352 U.S. 903 (1956); petition for clarification and rehearing denied, 352 U.S. 950 (1956), is distinguishable because members of the Alabama Public Service Commission, State and not local officers, were there made defendants in an injunction action.

V. Even if it had had jurisdiction below, the three-judge court should not have exercised it; the supermarket, and Mr. Chernock, who does business under its name, had ample opportunity to litigate constitutional issues in the previous State litigations. (Pages 33-42.)

Even if, contrary to the contentions of the appellant, a three-judge Federal court had jurisdiction of this case under Title 28, United States Code, sections 2281 and 2284, the court should not here have exercised its equitable jurisdiction. Two proceedings or sets of proceedings in the courts of Massachusetts have involved the Crown Kosher Super Market. The first of these was a group of three prosecutions against Harold Chernock, doing business as Crown Market, the criminal case recited at paragraph 20 of the complaint herein (Record, page 15; see 176 F. Supp. 503-508, Record Supplement, pages 191-198). The second of these proceedings was equity case No. 81,716 in the Superior Court for the Commonwealth of Massachusetts, brought by petition of "Crown Kosher Super Market of Mass. Inc., alias Harold Chernock d/b/a Crown Market," against Chief Gallagher, reciting threats of criminal prosecution against the petitioner in terms conceding the identity of "the petitioner,"

Crown Kosher Super Market of Massachusetts, Inc. (see 176 F. Supp. 495, Record Supplement, page 216), and Harold Chernock doing business as Crown Market, defendant in the criminal prosecutions (see 176 F. Supp. 503-508, Record Supplement, pages 191-198). It was open to Mr. Chernock and to the Crown Kosher Super Market of Massachusetts, Inc., to raise in the criminal case and in the State injunction case all the questions of Federal constitutional right raised in the three-judge court Federal case from which the appeal is now taken to this Court. The State litigation has long since terminated—the criminal case by affirmance in the Supreme Judicial Court of Massachusetts; the civil injunction case by final decree dismissing the bill on plaintiff's consent. The United States District Court should not have entertained jurisdiction in a new injunction suit. The petitioner should have been held barred by a principle comparable to that of *res judicata,* or collateral estoppel, or estoppel by record. And, in any event, full, clear and complete means of relief being available in the State courts, the Federal court as a matter of discretion should not have entertained jurisdiction. *Douglas* v. *City of Jeannette,* 319 U.S. 157 (1943). *Boynton* v. *Fox West Coast Theatres Corp.,* 60 F. 2d 851 (C.C.A. 10, 1932).

(*b*) SUMMARY OF ARGUMENTS CONCERNING THE EFFECT OF THE FOURTEENTH AMENDMENT IN THE TERMS AND CIRCUMSTANCES OF THE CASE—POINTS VI-A TO VI-F, INCLUSIVE.

VI-A. Sunday closing laws are today social and economic regulation—presumptively valid. (Pages 43-54.)

Massachusetts Sunday closing laws, even though prompted centuries ago by a religious tradition, have in the passage of time come to constitute a system of economic and social legislation, supplementary to and concurrent

with the policy of laws providing for limited hours of work and laws guaranteeing every man a day's rest in seven. The Massachusetts Sunday closing laws should be judged with the same strong presumption of constitutional validity which attaches to any other State social and economic legislation.

VI-B. Saturday sabbatarian closing is not imposed by "State action"; the Fourteenth Amendment is not called into effect by religious rules forbidding Saturday work. (Pages 54-56.)

Massachusetts has not, through its legislation, through the police of Springfield, or through the State courts, denied to plaintiffs any constitutional rights by requiring Sunday closing. The plaintiffs' abstention from business on Saturday was not commanded by the Commonwealth. The gravamen of the plaintiff's complaint arises from private action, not State action. The respected religious impulse which renders Saturday for the plaintiffs a day of lay inactivity, and the consequences of this Saturday inactivity which may for the plaintiffs render irksome compliance with those Sunday closing laws which govern the rest of the inhabitants of the Commonwealth, have no connection with any "State action," without which the Fourteenth Amendment has no effect.

VI-C. The United States Supreme Court has frequently and consistently upheld Sunday closing laws as constitutional. (Pages 56-64.)

The United States Supreme Court, in a long series of cases either affirming State court judgments or dismissing appeals from State courts and from a Federal court, has upheld State Sunday closing laws, has found them lay, social and economic regulation, and has rejected contentions that they unconstitutionally regulate or affect religious matters; that they so classify persons they affect as

to deny equal protection of the laws; that they are "arbitrary" and so deny due process of law; or that they otherwise conflict with the Federal Constitution.

VI-D. The great mass of legislation and adjudication in practically all States, enacting and upholding Sunday closing laws, demonstrates the reasonableness of the classifications involved. (Pages 65-76.)

The great mass of Sunday closing legislation in almost every part of the United States, which almost everywhere contains exceptions of various classes, and comparable legislation in other countries, demonstrate the reasonableness of such legislation with its classifications, according to the principle of *Muller* v. *Oregon*, 208 U.S. 412 (1908). The overwhelming majority of State adjudications upholding such legislation, tabulated in Appendix B of this brief, reinforce this conclusion. A decent respect to the opinions of mankind requires that the Massachusetts legislation be upheld.

VI-E. The facts herein stipulated or testified to do not show the Massachusetts Sunday closing laws unconstitutional as applied. (Pages 76-77.)

Neither the evidence nor any stipulation of fact before the three-judge District Court herein discloses any circumstances which make any Massachusetts Sunday closing laws unconstitutional as they are applied to the plaintiff Crown Kosher Super Market of Massachusetts, Inc., nor which makes any such law unconstitutional as it may affect any individual plaintiff.

VI-F. The decree herein is not justified by the opinion. (Pages 77-78.)

The decree of the three-judge court herein goes beyond the constitutional effect of any "findings and conclusions" embodied in the opinion of that court reported 176 F. Supp.

466 (1959), Record, page 133 *et seq.* Even if the "findings of fact" in that opinion are all accepted, the conclusions of law, and the decree predicated thereon, are not justified in departing as they do from the doctrine of the Supreme Court of the United States settled in a long series of affirmances and dismissals of appeals as presenting no substantial Federal question. Furthermore, the decree herein is in a form which, taken with the District Court opinion, leaves law enforcement in Massachusetts uncertain. Is an enforcement officer to regard as unconstitutional in Massachusetts the compulsory Sunday closing of delicatessen shops and super markets which sell certain kosher products? (see the opinion below, 176 F. Supp. at page 469, Record, page 135). Five per cent of non-kosher stock-in-trade will not, apparently, justify Massachusetts in shutting up the Crown Market. Would five per cent of kosher stock-in-trade justify another market in staying open on Sundays to serve strict Jewish sabbatarians who remained at home on Saturdays and authorize that market to sell to the general public as well? Does the evidence or opinion justify a decree giving Crown Kosher Super-Market a Springfield monopoly? The decree does not tell clearly what is given.

Conclusion of arguments summarized.

The decree below should be reversed and the complaint dismissed, in accordance with the previous adjudications of the Supreme Court of the United States and of the overwhelming majority of State courts which have spoken on the question here at issue.

At the very least, the matter should be remanded to the court below, to take more extensive testimony, as asked in the petition for rehearing presented by the Attorney

General of Massachusetts below (see 176 F. Supp. 466, at page 492; 178 F. Supp. 336; Record, pages 176, 179 and 184), and to give opportunity for clarifying the law in the State courts. *Harrison* v. *National Association for the Advancement of Colored People*, 360 U.S. 167 (1959).

(G) The Argument for Appellants.

a. Arguments Concerning Standing of Plaintiffs to Sue, Statutory Jurisdiction of the Three-Judge Court, and the Propriety of its Exercise—Points I to V, Inclusive.

I.

No One of the Individual Plaintiffs, Heafitz, Chaitovsky and Cohen, Customers of Crown Kosher Super Market; nor the Individual Plaintiff, Rabbi Sheinkopf, has Any Legal Interest in the Application of Chapter 136, Massachusetts General Laws, to the Corporate Plaintiff Super Market Sufficient to Give Any Such Individual Plaintiff Standing as a Party to the Federal Injunction Suit.

The individual plaintiffs entertain religious beliefs requiring them to abstain from certain foods unless specially prepared, to abstain from labor on Saturday, and, in the case of Rabbi Sheinkopf, to perform religious services for a congregation. The appellants and their counsel, by their argument here, neither express nor intend anything but sincere respect for the faith and for the scruples of these plaintiffs. The appellants point out that the law of the Commonwealth does not require these plaintiffs to work or do any business on their Sabbath, nor to consume any forbidden food or drink. There is no affirmative act re-

quired of these plaintiffs comparable to the flag salute required by West Virginia law and regulation of the school children in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). These individual plaintiffs make no contention that they have been threatened with prosecution for violation of any Sunday legislation, nor do they complain on any such basis. The majority of the three-judge court below found that ". . . these particular individual plaintiffs cannot, either by shopping at the corporate plaintiff's store or by inspecting it, or by any other act in the capacities in which they appear here, violate the Sunday law" (176 F. Supp. at 471, Record, page 139). See *United Public Workers of America (C.I.O.)* v. *Mitchell*, 330 U.S. 75 (1947). Appellants have found no decision of the Supreme Court or any lower Federal court holding that application of State regulatory legislation to a merchant creates a Federal case or controversy between the merchant's customers and the State which gives the customers standing in court to challenge the constitutionality of the legislation. *A fortiori*, no Supreme Court or other case gives standing to a minister of religion to challenge the legality of holidays on which State law forbids a merchant to sell goods to the public, including members of the minister's congregation.

The majority opinion of the three-judge court below stated (176 F. Supp. 466, at page 472):

> "If we were required to go into the matter, which we are not now, we would be prepared to hold that the facts of this case bring it squarely within the exception to the Supreme Court's 'rule of practice' forbidding one party to assert somebody else's constitutional rights, so that all plaintiffs could argue all grounds."

In support of this statement that court cites—

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925).
Pearl Assurance Co. v. *Harrington*, 38 F. Supp. 411 (D.C. D. Mass. 1941); affirmed, 313 U.S 549 (1941).
Barrows v. *Jackson*, 346 U.S. 249 (1953).

In *Pierce* a State statute required all children to go to public school. This statute thus forbade children to use the school week to attend a religiously maintained school, and legislated out of existence the religious school's source of pupils. In *Pearl Assurance* an English corporation was heard, though unsuccessfully, to urge the invalidity of a Massachusetts statute requiring it to have a United States citizen or corporation as its resident manager. In *Barrows* one white man sued another white man in a California State court; the plaintiff complained that the defendant had violated a restrictive covenant by selling certain realty without incorporating the restrictive clause in the deed, and by permitting "non-Caucasians" to occupy the premises. The Supreme Court of the United States affirmed a State court dismissal of the complaint, stating (at page 258):

> "This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity, *Shelley, supra;* or that this Court would deny California the right to incorporate in a statute, *Buchanan* v. *Warley*, 245 U. S. 60; or that could not be enforced in a federal jurisdiction because such a covenant would be contrary to public policy: . . ."

The difference is apparent between the present Crown Kosher litigation, and the Supreme Court's refusal in *Barrows* to force California to oblige Jackson to pay money because Jackson sold to a Negro. The State, through its court, has declined to do so; the United States Supreme Court properly refused to compel it. The instant case is much more like *Tileston* v. *Ullman*, 318 U.S. 44 (1943), in which the Supreme Court held that a physician had no standing to assert danger to his patients' lives from a Connecticut statute forbidding use of, or advice on, contraceptives. In the present Crown Kosher suit Massachusetts has applied no legal sanctions to the individual plaintiffs; and the corporate market can no more stand on customers' asserted rights than Dr. Tileston could stand on the needs of his patients.

The three-judge court below stated (176 F. Supp. at 471):

> "As stated in the complaint, the grounds for challenging the Sunday law are all founded upon the Fourteenth Amendment. Simply stated, these are: (1) That the Lord's day law is a law respecting the establishment of religion and denying the free exercise of religion and hence is violative of the due process clause of the Fourteenth Amendment. See Douglas v. City of Jeannette, supra, 319 U.S. at page 162, 63 S. Ct. at page 880; (2) that the statute deprives the corporate plaintiff of its property and the other plaintiffs of their liberty arbitrarily and therefore is a denial of due process of law guaranteed by the Fourteenth Amendment; and (3) that the statute denies the corporate plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. It can hardly be disputed that the corporate plaintiff has standing to assert the grounds numbered 2 and 3

supra, and that the individual plaintiffs have standing to assert the grounds numbered 1 and 2 supra."

The appellants here respectfully but emphatically do dispute the standing of any plaintiff in the case to challenge any Massachusetts statute as an "establishment" of religion." A State "establishment" which is not properly challenged by a taxpayer (see Point III, below) and which offends a plaintiff only because it exists, not because it does him some other and more particular harm, gives that plaintiff no standing in court. The plaintiff Doremus in *Doremus* v. *Board of Education of the Borough of Hawthorne*, 342 U.S. 429 (1952), would have had no standing in a three-judge Federal District Court to enjoin the Bible reading complained of if the plaintiff spoke for no child in school. He had proved no cost to the taxpayers; *a fortiori*, no money damage to himself, and, *a multo fortiori*, no money damage of the jurisdictional amount to sustain a Federal court suit. Confrast the position of the parents of school-children in another Bible-reading case, *Schempp* v. *Abington Township*, 177 F. Supp. 398 (D.C. E.D. Pa. 1959). In that case, as in *Doremus*, one pupil graduated prior to conclusion of the litigation. "All the parties," remarked the court (page 399), "are in accord that the application for an injunction is moot as to him."

The standing of the individual plaintiffs to complain here of a denial of the free exercise of religion, and of a deprivation of liberty "arbitrarily" (176 F. Supp. 471, Record, page 139), is not easily separated from consideration of the merits. The chain of consequences connecting any action of the Commonwealth of Massachusetts with the plaintiffs' free exercise of religion or other liberties is too long and has too many links for legal recognition. They complain that the personnel of the Crown Market are faith-

ful followers of Jewish doctrine, and hence that the Market is closed on Saturday. Massachusetts has not caused this closing. The plaintiffs Heafitz, Chaitovsky and Cohen complain (complaint, paragraphs 16 and 17, Record, page 15) that business and domestic reasons prevent their shopping on week-days; but these allegations are neither stipulated nor proved by testimony. Even if these matters had been established, they would not be ascribable to Massachusetts. Rabbi Sheinkopf does not even assert that he is a customer of the Crown Market. His connection with action by Massachusetts is that of spiritual leader of persons who, for non-governmental reasons, do not shop on Saturday and who complain that, under the law of Massachusetts, a store where they want to buy may not lawfully sell on Sunday, save within narrow limits.

The remoteness of the connection of these individuals with any State action of Massachusetts takes them out of the case entirely. The motion to dismiss should have been granted as to the individual plaintiffs.

II.

No Party, Individual or Corporate, has Here Any Standing as a Taxpayer.

Three facts stand out respecting any standing of any taxpayer plaintiffs in this case.

(1) The court below, in the opinion constituting its findings of fact and conclusions of law, makes no mention of any taxpayer standing.

(2) At no place in the record does there appear any statement or proof that the enforcement of the Massachusetts Sunday legislation generally, or enforcement against Crown Market or Harold Chernock, cost any sum additional to the general cost of the Com-

monwealth's business. The state of the record is in this respect like that in *Doremus* v. *Board of Education of the Borough of Hawthorne*, 342 U.S. 429 (1952). As *Doremus* showed, there would have been in the present situation no Federal court jurisdiction on appeal by a taxpayer from a State judgment. For the same reason there is no jurisdiction for a taxpayer in a Federal court of first instance.

(3) Even if, contrary to the inference from *Doremus*, one presumes some State cost ascribable to the instant Sunday law enforcement, still there is a total lack of showing that any plaintiff taxpayer paid any fraction of this, and all the more a total lack of any showing on behalf of any taxpayer, of the $3000 jurisdictional amount, required when this case was instituted. No party paid $3000 more taxes because of the Massachusetts Sunday laws, so far as this record shows.

As Mr. Justice Frankfurter wrote in *Coleman* v. *Miller*, 307 U.S. 433 (1939), at 465:

> ". . . the ordinary state taxpayer's suit is not recognized in the federal courts . . ."

Certainly no party has here established standing in court as a taxpayer.

III.

The Crown Kosher Super Market of Massachusetts, Inc., has No Religion; it has No Standing to Assert Impairment of Religious Freedom.

This point is difficult to document as it seems so obvious. Despite judicial recognition of a corporation's status as

a "citizen" for purposes of diversity jurisdiction, and as a "person" for economic protection of freedom of publication under the Fourteenth Amendment, a corporation is not a citizen under the Privileges and Immunities Clause (*Selover, Bates & Co.* v. *Walsh*, 226 U.S. 112 (1912)). See the opinion of Mr. Justice Roberts, in which Mr. Justice Black concurred, in *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939), at page 514. And certainly no corporation can be baptized. The phrase "soulless corporation" here applies directly.

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925), is not in conflict with this principle. The opinion of the Supreme Court there rests on the economic harm done to the corporation maintaining the school. The Supreme Court, by the same opinion, protected Hill Military Academy, a lay school. Mr. Justice McReynolds wrote for the Court, at page 535:

> "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255; *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363. But they have business and property for which they claim protection."

In *Pierce* and *Hill* the public who might have patronized the two schools were by State statute precluded from sending their children there. Massachusetts, in contrast, keeps no person, individual plaintiff here or any other, from patronizing the Crown Kosher Super Market save on those days when the whole Massachusetts public is denied that opportunity.

The Supreme Court of Illinois, rejecting the contention of certain corporate and other car dealers that a Sunday closing ordinance interfered with their religious rights under the Illinois Constitution, wrote:

> "The plaintiffs, most of whom are corporations, have not alleged that they are members of any religious groups that would be affected by this, and therefore they have no standing to raise the objection."
>
> *Humphrey Chevrolet, Inc.*, v. *City of Evanston*, 7 Ill. 2d 402, at 408, 131 N.E. 2d 70, at 73 (1956).

The charter of a Massachusetts business corporation can be amended or repealed by appropriate legislation at any time, under the power reserved by chapter 155, section 3, of the Massachusetts General Laws, which provides:

> "SECTION 3. [Charters Subject to Alteration or Repeal.] Every act of incorporation passed since March eleventh, eighteen hundred and thirty-one, shall be subject to amendment, alteration or repeal by the general court. All corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them. Corporations shall, notwithstanding such repeal or dissolution, be subject to sections fifty-one and fifty-two. Such laws of amendment, alteration or repeal or such dissolution shall not take away or impair any remedy which may exist by law consistently with said sections against the corporation, its members or officers, for a liability previously incurred."

And the Massachusetts Constitution, Amendment LIX of 1918, provides:

> "[*Every Charter, etc., Subject to Revocation, etc.*] Every charter, franchise or act of incorporation shall forever remain subject to revocation and amendment."

This power of Massachusetts is entirely inconsistent with any idea that a corporation, which may tomorrow be dissolved by general law, and so may cease to exist, still has some religious commitment in its artificial person which permits it to assert religious freedom as if it were one of the school-children in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

The Crown Kosher Super Market of Massachusetts, Inc., must thus treat this litigation as a "pocketbook case." Whatever standing it has here is the asserted protection of its business interests against a statute which treats it exactly the same as every other super market. Indeed, the corporate plaintiff below had as its principal complaint precisely this equality of treatment. And the effect of the decree below is to give it a favored position on Sunday, because of the religious beliefs of its officers and employees.

The lack of sustainable claims to religious freedom in the corporate being of a super market is perhaps conceded by the majority opinion below. "It can hardly be disputed that the corporate plaintiff has standing to assert the grounds numbered 2 and 3, supra . . ." 176 F. Supp. 471-472; Record, page 139. The omission of ground numbered 1, "establishment" and religious freedom, is significant.

IV.

The Three-Judge Court Below should have Granted the Motion to Dismiss on the Ground that Section 2281 of Title 28, United States Code, gives a Three-Judge Court No Jurisdiction to Enjoin a Purely Local Officer, as Distinguished from an Officer of the State.

The text of section 2281 is:

> "*§ 2281. Injunction against enforcement of State statute; three-judge court required.*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Chief Gallagher is a municipal, not a State, officer. In *Ex parte Public National Bank*, 278 U.S. 101 (1928), the Supreme Court refused a writ of mandamus to compel the assembling of a three-judge court to hear a suit to enjoin a city tax official from enforcing a tax. The statute, Title 28, United States Code, section 2281, was then Judicial Code, section 266. Mr. Justice Sutherland wrote for the Court (at page 104):

> "The suit here involved the constitutionality of a state statute, but it was not brought to restrain 'the action of any officer of such State in the enforcement'

thereof. The persons sued are municipal officers, having no state functions to perform, but charged only with the duty of collecting and receiving taxes assessed by other city officials in no respect for the use of the state but for and in behalf of the city alone. . . . § 266 requires the concurrence of two things in order to give the three-judge court jurisdiction: (1) the suit must seek to have a state statute declared unconstitutional, or that in effect, and (2) it must seek to restrain the action of *an officer of the state* in the enforcement of such statute. See *Henrietta Mills Co.* v. *Rutherford County*, 26 F. (2d) 799, 800; *Connor* v. *Board of Comm'rs of Logan County, Ohio*, 12 F. (2d) 789, 790; . . . The second requisite here is lacking."

Browder v. *Gayle*, 142 F. Supp. 707; affirmed, 352 U.S. 903 (1956), is distinguishable, as in that case State officers —members of the Alabama Public Service Commission— were defendants.

V.

Assuming without Conceding that there was Statutory Jurisdiction in the Three-Judge Court Below, That Court should Not have Exercised Jurisdiction Herein.

The facts on which this argument is based are set forth in detail, with reference to the Record and opinions below, in the Statement of Questions Presented for Review (5) *a* and *b*, pages 5-7 of this brief, and in the summary of this point, V, at pages 17 and 18 of this brief. To avoid unnecessary repetition, this matter is not all here restated. The Court is reminded that, in previous criminal prosecutions brought by Massachusetts against "Harold Chernock, doing business as Crown Market," the same statute

here in question was held constitutional in a prosecution of the only plaintiff's witness in the present case, Harold Chernock, president of the corporate plaintiff here, its general manager, and owner of 50 per cent of its stock. The papers in that criminal case are set forth in 176 F. Supp. 503-520, Record Supplement, pages 191-215. In that criminal litigation Mr. Chernock could have argued all the constitutional points here asserted on behalf of his market. The Supreme Judicial Court affirmed Chernock's convictions. *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N.E. 2d 920 (1957). Chernock took no step to obtain review in the Supreme Court of the United States.

The prevailing opinion below discounts the effect of that previous criminal adjudication on the ground (see 176 F. Supp. 470, Record, page 137) that in it the defendant raised issues of State constitutionality but not Federal constitutionality; that *res judicata* was not herein pleaded (or so the Court stated); and that it is "obvious" that neither the corporate plaintiff nor any individual plaintiff herein is bound by those criminal judgments.

As to the absence of a pleading of *res judicata, collateral estoppel, estoppel by record* or similar matter, the appellants point out to this Court that the answer (paragraph 5, Record, page 37) recites the previous criminal case in reasonable detail with a citation to the Massachusetts Supreme Judicial Court affirmance; and also recites (paragraphs 7 and 8, Record, pages 38 and 39) the Massachusetts State court equity case, No. 81716, brought by the present corporate plaintiff against Raymond P. Gallagher, one of the present defendants, still pending when the answer was filed. (See for the papers in that case 176 F. Supp. 495-502, Record Supplement, pages 216-226.) The answer does not, in thus pleading these matters of defense, use the term "res judicata" or other appellation to charac-

terize them; nor was it necessary. Whatever legal effect the previous criminal and civil proceedings had was brought before the three-judge court by the recitals in the answer and in the stipulation hereafter described, and by the arguments of counsel, based thereon, presented to the court below.

A stipulation, signed by attorneys for plaintiffs and defendants in the present Federal case, and introduced in the case, recites the previous State criminal and injunction cases (Record, page 41).

When the present case came before the three-judge court, counsel for the Commonwealth vigorously urged these previous criminal proceedings as reasons why the complaint herein should be dismissed (Record, pages 52-55). His opponent mentioned the same case (Record, pages 88, 95) in his argument. Counsel for the Commonwealth discussed with the court the question whether the defense he was raising was technically *res judicata* or something analogous in the nature of estoppel (Record, page 53). Chief Judge Magruder said to counsel for the Commonwealth (Record, page 53): "Well, you seem to me to be making a statement that involves the concept of res adjudicata." Clearly the point was before the three-judge court.

As to the non-identity of parties in the three litigations concerned, it is true that the present individual plaintiffs first appear in the present Federal case, though, as the appellant contends, they have here no standing. However, the present corporate plaintiff, Crown Kosher Super Market of Massachusetts, Inc., was plaintiff in the State equity case, No. 81716. The complaint in that action asserted the substantial identity, for the purposes of this litigation, of Harold Chernock and the Crown Kosher Super Market of Massachusetts, Inc. The bill of complaint in that action

is captioned "Crown Kosher Super Market of Mass. Inc., alias Harold Chernock d/b/a Crown Market, Petitioner." See footnote 1 to dissent of Judge McCarthy, 176 F. Supp. 478, Record, page 150, and the bill in the State equity suit, reproduced 176 F. Supp. 495, Record Supplement, page 216. That bill recites:

> "The petitioner is Crown Kosher Super Market of Mass. Inc., . . . also known as Harold Chernock d/b/a Crown Market . . ."

The bill then describes the State criminal prosecution and continues:

> ". . . trial was had . . . and the petitioner found guilty . . . The Respondent has threatened that he will continue to make criminal complaints against your petitioner."

The only criminal defendant connected with the present litigation is thus described in the criminal papers as "Harold Chernock doing business as Crown Market." In equity case No. 81716 this name is treated as a convertible term for Crown Kosher Super Market of Massachusetts, Inc. Mr. Chernock, asked at the trial whether his market was open on Sunday, replied simply: "I am" (Record, page 12).

In the previous State injunction case the plaintiff could have raised whatever constitutional issues are open to the Crown Kosher Super Market here. Instead, the plaintiff chose, pending the State injunction case, to commence the present Federal suit and, five months later, to dismiss the State suit. The existence and issues of the previous criminal and civil litigation were thus all pleaded and discussed before the three-judge court in the present case, and the

substantial identity of the parties in the previous and present litigation (except for the customers and Rabbi) was established out of the admissions of Crown Kosher Super Market of Massachusetts, Inc., and its president and general manager. The customers and Rabbi, we say with respect, are too remote from the present case to have standing to sue. And the Crown Kosher corporation should be held bound by the previous litigation. The convictions in the criminal cases were affirmed by the Massachusetts Supreme Judicial Court; Mr. Chernock could have raised therein any defense he chose; he did choose to assert the State constitutional provisions concerning guaranties of freedom of religion (see his brief, set forth 176 F. Supp. 519, Record Supplement, page 208), including one—

> "No law shall be passed prohibiting the free exercise of religion."

That provision is substantially identical with the provision of the First Amendment, "incorporated" in the Fourteenth. In that criminal case, not only could the defendant have argued the effect of the Federal Constitution, but the defendant there did cite in the brief, and comment on, a note in the Yale Law Journal for March, 1952, entitled: "Sunday Statutes in a Modern Community". (61 Yale L.J. 427; see the reference in the defendant appellant's brief set forth 176 F. Supp. 520, Record Supplement, page 209). In the Yale Law Journal paper the United States Supreme Court holdings under the Federal Constitution, especially *People* v. *Friedman,* 302 N.Y. 75; affirmed, 341 U.S. 907 (1951), are discussed and analyzed. Clearly, in *Chernock* the appellant was conscious of the availability of an argument under the Fourteenth Amendment.

The substantial identity of interests and of persons between the corporate plaintiff here, the same plaintiff in the State equity case, and "Harold Chernock d/b/a Crown Market" in the State criminal case; the opportunity to raise the same issue of Federal constitutionality in the prior two cases; the argument of substantially the same question in the criminal case, all support the propriety of the motion to dismiss made below in the present case.

Cromwell v. *County of Sac*, 94 U.S. 351 (1876).
Grubb v. *Public Utilities Commission of Ohio*, 281 U.S. 470 (1930).
American Surety Co. v. *Baldwin*, 287 U.S. 156 (1932).

Even if the preceding litigation, criminal and civil, between the Commonwealth and Chernock and the Crown Kosher Super Market of Massachusetts, Inc., did not erect a fixed legal bar in the way of the corporate plaintiff, still the three-judge court, as a matter of reasonable deference to State jurisdiction, should have declined to accept Federal jurisdiction.

There remain difficulties in the construction of the State legislation in question, Massachusetts General Laws, chapter 136 (see argument of counsel for the plaintiffs, Record, page 96; and argument of the Assistant Attorney General, Record, pages 115, 116, 117). The State courts are the appropriate tribunals for that construction. *Harrison* v. *National Association for the Advancement of Colored People*, 360 U.S. 167 (1959).

In *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), the Court wrote, at page 163:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person

is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Fenner* v. *Boykin*, 271 U. S. 240. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.' *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95, and cases cited; *Beal* v. *Missouri Pacific R. Corp.*, 312 U. S. 45, 49, and cases cited; *Watson* v. *Buck*, 313 U. S. 387; *Williams* v. *Miller*, 317 U. S. 599."

Boynton v. *Fox West Coast Theatres Corp.*, 60 F. 2d 851 (C.C.A. 10, 1932), was an action, brought by the Fox Corporation in the District Court for the District of Kansas, seeking an injunction against enforcement of the State Sunday closing law. The complaint was based on the United States Constitution's Commerce Clause, and on discriminatory enforcement charged to be a denial of equal protection under the Fourteenth Amendment. The District Court granted an interlocutory injunction, but on

appeal the Circuit Court of Appeals for the Tenth Circuit reversed and ordered the bill dismissed. The court used language remarkably applicable to the case now at bar:

> "Finally, are plaintiffs entitled to equitable relief? It is a general rule that a court of equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. Fenner v. Boykin, 271 U. S. 240, 243, 244 . . . An exception to this general rule exists when the prevention of a threatened prosecution under an alleged unconstitutional enactment 'is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate.' Cline v. Frink Dairy Co., 274 U. S. 445, 451, 452, . . .
>
> "But the attack on the constitutionality of the statute must be real and substantial and must at least present a fairly debatable question; the right alleged to be invaded or threatened must be clear (Truly v. Wanzer, 5 How. 141 . . . ; and facts from which it will appear that the circumstances are exceptional and the 'danger of irreparable loss is both great and immediate' must be clearly and fully set forth. Pittsburg, C., C. & St. L. Ry. Co. v. Board of Public Works, 172 U. S. 32, . . .
>
> "'An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court.' Fenner v. Boykin, supra.
>
> "Here, if we give the fullest force to the allegations of the amended complaint, the most that can be said is that plaintiffs will either have to close their

theaters on Sunday and lose the profits of Sunday operation, or submit to repeated prosecutions and the possibility of ultimate decrees of ouster against them. Have plaintiffs brought themselves within the exception to the general rule? If the attack on the constitutionality of the statute were predicated on substantial grounds, the question might be answered in the affirmative; but such is not the case. We have shown that, prior to the commencement of this suit, the Supreme Court of Kansas had sustained the validity of the statute and held that the operation of a motion picture theater on Sunday falls within its prohibition, and the Supreme Court of the United States had upheld the constitutionality of a similar statute, even when applied to those engaged in interstate commerce. Hennington v. Georgia, supra [163 U.S. 299 (1896)]. Such being the facts, while plaintiffs no doubt have the right to assert their alleged defenses, we are of the opinion that they should do so in the threatened criminal and quo warranto proceedings when brought, first in the state courts and then, if they are so advised, by seeking a review in the Supreme Court of the United States in the manner provided by the Judicial Code (see 28 USCA § 344); that in the meantime it will be their duty to obey the statute; and that they are not entitled to injunctive relief.

"We conclude that the bill is without equity and that plaintiffs are not entitled to the relief sought. It follows, notwithstanding this is an appeal from an interlocutory order, that this court has the power to consider this case on the merits and to direct a dismissal of the bill. Consolidated Cement Corp. v. Pratt (C. C. A. 10) 47 F.(2d) 90, 93.

"The decree is reversed and the cause remanded with instructions to dismiss the bill at plaintiffs' cost."

The circumstances of this *Boynton* case are so strikingly like those in the case at bar that detailing the analogy is superfluous. No crisis prevented the Crown Kosher Super Market from pursuing whatever remedy it might have in State courts first and then in the Supreme Court of the United States. As Mr. Chernock testified: "I never closed up . . . No, I did not . . . I never was" (Record, page 128).

If, as the appellant contends, the failure of the *alter ego* of the present corporate plaintiff—"Harold Chernock doing business as Crown Market"—to pursue his available remedies in the State criminal litigation now bars the corporate Market; if the present corporate plaintiff, by failure to persevere in its State court equity suit has made its loss of rights still more irretrievable; then the present case should be dismissed on a theory akin to collateral estoppel or *res judicata*. Federal constitutional rights can be irretrievably lost by failure to follow the right course in State procedure, as they were in *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 190 (1925).

But, if the corporate plaintiff, Crown Kosher Super Market, still has State remedies with Supreme Court review available, the Federal District Court should decline to substitute its judgment of first instance for that of the Massachusetts courts.

On either theory, the present action should be dismissed.

b. Arguments Concerning the Effect of the Fourteenth Amendment in the Terms and Circumstances of this Case—Points VI-A to VI-F, Inclusive.

VI-A.

The Massachusetts Sunday Laws, Now General Laws, Chapter 136, Despite Religious Impulses in their Ancient Antecedents, by Passage of Time have Become a System of Lay Economic and Social Regulation, Providing a Uniform Day of Rest and Recreation in Each Week; their Constitutionality should be Judged with the Same Presumption of Validity as Other Social and Economic Legislation; So Judged the Legislation here Questioned is Clearly Valid.

While many "Sunday Laws," in the Thirteen Colonies, in the States generally, and in Massachusetts in particular, undoubtedly had religious connotations when first enacted, they have, through the years, come to constitute a system of provisions of the same general character as wage-and-hour laws or other laws guaranteeing that the pressures of work will not be unreasonably continuous, or burdensome on the people. The Massachusetts Supreme Judicial Court so held when this change in the basis of its Sunday legislation became relevant to the decision of a case. In *Commonwealth* v. *Has*, 122 Mass. 40 (1877), the defendant was charged with violation of the Massachusetts Sunday statute then in force, which forbade keeping open a shop "on the Lord's day." The defendant contended that, as applied to one, such as he, who conscientiously observed Saturday as his Sabbath, the Massachusetts statute was unconstitutional, in derogation of the Eleventh Amendment to the Constitution of the Commonwealth of Massachusetts, which provides: ". . . no subordination of any one sect or denomination to another shall ever be estab-

lished by law." The unanimous Supreme Judicial Court, speaking through Mr. Justice Devens, wrote (page 42):

"This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community.

"While in the Constitutions of many of the States of the Union there are, in different forms, provisions that no preference shall be given to one religion or form of religious belief, acts for the observance of the

first day of the week as a day of rest from labor have been repeatedly passed. In all of them, so far as we have been able to examine, the constitutionality of such acts has been sustained for reasons such as have been briefly stated above. *Specht* v. *Commonwealth*, 8 Penn. St. 312. *Frolickstein* v. *Mobile*, 40 Ala. 725. *Ex parte Andrews*, 18 Cal. 678, and cases cited.

"Exceptions overruled."

The *Has* case has been repeatedly cited and followed by the Supreme Judicial Court of Massachusetts. *Commonwealth* v. *Dextra*, 143 Mass. 28, 8 N.E. 756 (1886). *Commonwealth* v. *Starr*, 144 Mass. 359, 11 N.E. 533 (1887), and most recently in *Commonwealth* v. *Chernock* (three cases), 336 Mass. 384, 145 N.E. 2d 920 (1957), which involved Mr. Harold Chernock, who is president, general manager, and half-owner of the corporate plaintiff in the present litigation. The nature of Massachusetts Sunday closing legislation pronounced in the *Has* case was reinforced by a most recent expression of a Massachusetts public body on the nature of the Sunday legislation of that Commonwealth. The Legislative Research Council, pursuant to Omnibus Senate Order 657 of 1959, submitted to the Massachusetts Senate on February 24, 1960, a report including a discussion of the subject. By Order 657 the Massachusetts Legislative Research Council had been directed ". . . to make an investigation and study . . . relative to the laws relating to legal holidays and their observance; . . ." In the report so made, the Legislative Research Council observes, under the heading "Objectives of Sunday Legislation":

"In general, Sunday laws protect the public by guaranteeing one day in seven to provide a period of

rest and quiet. Health, peace, and good order of society are thereby promoted. Such provision is essentially civil in character and the statutes are not regarded as religious ordinances."

The majority opinion of the three-judge District Court below passes lightly over the *Has* case, 122 Mass. 40 (1877), by stating that the Federal District Court need not accept the *Has* characterization of the Massachusetts Sunday closing laws as a non-religious "civil regulation, providing for a fixed period of rest . . ." But, on the contrary, Massachusetts State judges are best equipped to determine the true character of Massachusetts legislation. The underlying reason for *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), applies here. The District Court cites *Society for Savings in the City of Cleveland* v. *Bowers*, 349 U.S. 143 (1955), as its authority for not accepting the characterization of Massachusetts legislation by the Massachusetts Supreme Judicial Court. *Society for Savings in the City of Cleveland* v. *Bowers* involved a claim of exemption of Federal bonds from State taxation. The Ohio courts held that the tax was "on" the intangible property interests of depositors. The Supreme Court of the United States, on appeal, stated: "We must judge the true nature of this tax in terms of the rights and liabilities which the statute, as construed, creates" (page 151); and held the tax to be "on" the banks themselves (page 154). This is, however, not a holding that a Federal court may disregard a State court construction of a statute as a lay commercial regulation. Still less may a Federal court derive its conclusion from an amicus brief, not connected with the Commonwealth; the three-judge court below, however, refers to a brief of two religious

organizations as having "let the cat out of the bag" (see 176 F. Supp. 474, Record, page 144).

The Massachusetts Sunday closing laws are thus held by Massachusetts courts, as the Sunday closing laws of other States have been held by their courts, to be lay economic and social regulations, intended to protect working people against the pressure, exerted by competition, to give up the common day-off they wish to enjoy with families, relatives and neighbors.

The opinion of the majority of the three-judge court herein characterizes the statement by the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Has*, 122 Mass. 40, 42 (1877), that the Sunday law is "essentially a civil regulation," as "an *ad hoc* improvisation," and states that an amicus brief filed by the Lord's Day League of New England and the Archdiocesan Council of Catholic Men "lets the cat out of the bag." On the contrary, an examination of the multitude of adjudications on Sunday law discloses that many courts repeat in many different cases the same themes which occur in the *Has* case. Through the adjudications runs the holding that Sunday closing legislation, which two and three centuries ago had mainly religious connotations, now provides for a day of rest and recreation. Associated with this is frequently a statement that the fact that many people regard this day as one for religious exercises does not prohibit the Legislature from selecting this day for a day of rest and recreation. Such statements occur in the frequently cited case of *Ex parte Andrews*, 18 Cal. 678 (1861). That case was decided, of course, before the Fourteenth Amendment. The defendant had been convicted for keeping open his store on Sunday in violation of a California statute, and he unsuccessfully sought habeas corpus on the ground that the statute was in conflict with a "freedom of religion" clause of the State Constitution. Judge Baldwin, with

Chief Justice Field and Associate Justice Cope concurring, wrote:

> "It is said besides that this law affords indirectly protection against oppression to employees, women, apprentices, and servants; and that but for the law, men would keep open stores and shops because their neighbors did so, and that by competition a sort of compulsion exists to violate the laws of health."

The *Andrews* case has become a classic in this branch of the law, repeatedly cited in succeeding cases which followed it.

The same proposition is stated by Mr. Justice Harlan, delivering the opinion of the Supreme Court of the United States in *Hennington* v. *Georgia*, 163 U.S. 299 (1896). The Court there rejected a contention that a Georgia statute which forbade the running of freight trains on Sunday was unconstitutional because of conflict with the Commerce Clause. He wrote (at page 304):

> "It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor."

The Court adds at page 307:

"Doubtless it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being exacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the Ten Commandments. Those of them which are purely and exclusively religious in their nature cannot be, or be made civil duties, but all the rest of them may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but whether it is or is not, it is certain that the legislature of Georgia has prescribed it as a civil duty."

See, to a similar effect, *Broad-Grace Arcade Corp.* v. *Bright*, 48 F. 2d 348 (D.C. E.D. Va. 1931); affirmed per curiam, 284 U.S. 588 (1931).

The argument is sometimes heard that the Legislature, if it wished merely to provide one day in seven, could have contented itself as the Massachusetts Legislature has in chapter 149, section 48, of the General Laws, by providing that everyone shall have one day in rest in every seven, without specifying the day. The necessity for such a statute becomes apparent when it is remembered that many establishments in Massachusetts are permitted to remain open seven days a week. The druggist is an example; the licensed pharmacist on duty in a Massachusetts drugstore is entitled to one day in seven in which he can rest even though the store where he works may be open seven days a week. But this does not accomplish what a specified common day of rest will accomplish.

Where more than one member of a family is employed, they will often wish to have the same day off for joint recreation. A man whose children are in school from Monday through Friday would have few opportunities to go to the beach with his entire family for a day if his day off were on, say, Wednesday. A young man employed in a factory who wishes to take a girl for an afternoon ride will find this difficult if his day off is Tuesday and hers is Thursday. The Fourteenth Amendment surely does not forbid a State Legislature to select Sunday for the common day off, simply because a number of members of the public, though by no means all, regard it as a day of religious obligation.

No one would suggest that present-day Russia is a country apt to introduce legislation "establishing a religion." And indeed in 1929, when continuous industrial production was desirable, a "five-day week" (four work days and one day off), with rotation of day schedules, was introduced. In certain trades a six-day week (five work days, one day off) was used. As this plan was administered, one man might have his day off on Tuesday and another on Wednesday. (For a discussion of this matter see Schwarz, "Labor in the Soviet Union," 1952, pages 268-299.) Employees on the whole resented the innovation. Schwarz quotes a reporter writing in "Pravda" of October 1, 1929:

> "What do we have our families for? Are we to get no rest at all? What are we to do at home if the wife is in the factory, the children in school and no one can come to see us? What is left but to go to the public tearoom? What kind of life is that—when holidays come in shifts and not for all workers together? That's no holiday if you have to celebrate by yourself?"

On June 26, 1940, by decree of the Praesidium of the Supreme Soviet of the U.S.S.R. it was decided—

> "To change work, in all state, cooperative, and public enterprises and institutions, from a six-day week to a seven-day week, considering the seventh day—Sunday—as a day of rest."

See Bulletin of the Supreme Soviet of the U.S.S.R. (Vedomosti Verkhovno Soveta CCCP), No. 20(83), 5 July, 1940, page 1, column 1.

In short, when the majority of the three-judge court below in its opinion (176 F. Supp. 466, Record, page 145) writes that what Massachusetts has done in the statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's Day it is ascribing what today is an incident to, but not the principal character of, Sunday as a day off from work.

If then, as the Massachusetts and many other Federal and State courts have held, Sunday closing laws are lay provisions for a day off from work, when the constitutionality of such Sunday closing laws is challenged under the Fourteenth Amendment the question should be judged with every presumption in favor of constitutionality. The day of *Lochner* v. *New York*, 198 U.S. 45 (1905), is over; "economic due process" questions are now decided under the presumption of validity developed in *Nebbia* v. *New York*, 291 U.S. 502 (1934), and *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).

When denial of equal protection under the Fourteenth Amendment is alleged, the Supreme Court of the United States will seek reasons to justify the classification and differentiation of treatment prescribed in the challenged law. The process of judging does not require, or permit,

an empiric inquiry into the motivation of each legislator who voted for a statute, or of the Governor who approved it. The question is whether reasonable legislators might have had some rational purpose, and a court will seek in its own experience and knowledge for such an attributed legislative intent.

This phase of the judicial process was described in 1911 by Mr. Justice Van Devanter, writing the opinion of the unanimous Supreme Court in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61. In that case the Supreme Court affirmed a decree of the Federal Circuit Court for the Southern District of New York. The decree so affirmed had refused to enjoin a New York statute enacted to safeguard natural mineral springs against waste and impairment. The party seeking the injunction contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment. The Court, describing "The rules by which this contention must be tested" (page 78), stated:

> "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." (Page 78.)

This principle of constitutional reasoning has been applied by the United States Supreme Court in a number of comparatively recent cases to uphold State legislation. This Court sustained the Michigan Barmaids Law in *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), against the contention that no reasonable justification permitted classification of daughters of female owners of bars with those women forbidden to tend bar, while permitting this employment to

daughters of male owners. This Court found a conceivable legislative justification in the superior, protective oversight of a male relative. The Louisiana pilots' case, *Kotch* v. *Board of River Port Pilot Commissioners for the Port of New Orleans*, 330 U.S. 552 (1947), offers another example. In *Railway Express Agency, Inc.*, v. *New York*, 336 U.S. 106 (1949), the Supreme Court upheld a statutory distinction between advertising on vehicles owned by the seller of the product advertised and advertising on vehicles otherwise owned. In *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), this Court upheld an Oklahoma statute exempting sellers of ready-to-wear eyeglasses from a regulatory system covering other eyeglass and frame selling. In short, this Court will uphold differentiation in economic or commercial regulation if there is any conceivable rationality in the distinction.

In the case at bar the Massachusetts Legislature has made a distinction between certain business activities which it has, on the one hand, considered essential to public safety and welfare, or conducive to wholesome recreation and amusement, and, on the other hand, those business activities which it has chosen to suspend on Sunday so that employees may have a common day off. It has made a distinction between foods generally on the one hand and on the other foods it deems essential, such as milk (chapter 136, section 6) or which may have a holiday flavor, such as frozen desserts (chapter 136, section 6).

It distinguishes between foods less apt to spoil, and fresh meat, which requires special supervision and attention. The Massachusetts Legislature has elsewhere made particular and elaborate provisions for inspection of fresh meat when slaughtered and when sold at retail. See General Laws, chapter 94, section 118 *et seq.*, especially sections 127 and 147, which provide for co-ordination of such

inspectoral activity by State and local officers with similar activity by the United States Department of Agriculture. See also the Federal Meat Inspection Act, Title 21, United States Code, section 71 *et seq.* See also Massachusetts General Laws, chapter 94, sections 129 and 130, forbidding sale or possession for sale of unstamped meats; section 147, providing for inspection of meat and other foods offered for sale. The Legislature, recognizing the likelihood that meat may be unwholesome unless the precautions so provided are carried out, may well have reconciled the need for Sunday rest of the staff of inspectoral officers with the wish of the public for meat for Sunday dinner by limiting the hours when fresh meat may be sold on Sundays to the early part of the day, ending at 10 o'clock a.m. See *Osborn* v. *Ozlin*, 310 U.S. 53 (1940), at page 64. Is a court to find this an unconstitutional reconciliation of diverse public needs and wishes?

VI-B.

Saturday Sabbatarian Closing is Not Imposed by State Action; its Consequences do Not Call into Effect the Fourteenth Amendment.

The Fourteenth Amendment Due Process and Equal Protection Clauses tell only what a State shall not do. Religious scruples, or the urging of an organized religious body, which closes a businessman's store on Saturday, or which inhibits purchasers from buying food if it is elsewhere available on Saturday, is not attributable to the State. Massachusetts applies its Sunday closing laws to all alike, save for some concessions to Saturday sabbatarians in General Laws, chapter 136, section 6. Non-governmental persuasion, operating on the management of Crown Kosher Super Market and on those members of its

clientele who are religiously scrupulous, does give one business day less in each week to the orthodox Hebrew than it does to the person not of that religion. But that non-governmental persuasion to observe Saturday as a Sabbath does not license Saturday sabbatarians to disregard the Sunday restrictions which limit the rest of the community. Religious scruples do not license affirmative activity forbidden by otherwise binding law. A recent example is *Kissinger* v. *United States*, 250 F. 2d 940 (C.A. 3, 1958). There a farmer entertaining religious scruples against limiting the productivity of his acres produced wheat, and marketed it, in excess of a quota imposed on him under the Agricultural Adjustment Act. The United States sued to recover the statutory penalties; Kissinger attempted a defense under the First Amendment, contending that the Act, as applied to him, interfered with his exercise of a religious duty. This defense failed in the District Court; the Court of Appeals for the Third Circuit affirmed unanimously. Maris, J., wrote (see 250 F. 2d at page 943):

> "... the freedom of religion guaranteed by the First Amendment does not include freedom from all regulation of an individual's acts and conduct as contradistinguished from his beliefs. On the contrary, the enforcement of a reasonable nondiscriminatory regulation of conduct by governmental authority to preserve peace, tranquility and a sound economic order does not violate the First Amendment merely because it may inhibit conduct on the part of individuals which is sincerely claimed by them to be religiously motivated. Davis v. Beason, 1890, 133 U.S. 333, 342-345; Prince v. Commonwealth of Massachusetts, 1944, 321 U.S. 158, 163-171; Poulos v. State of New Hampshire, 1953, 345 U.S. 395, 405; Mitchell v. Pilgrim Holi-

ness Church Corp., 7 Cir. 1954, 210 F.2d 879, 884-885, certiorari denied 347 U.S. 1013.

"The judgment of the district court will be affirmed."

The Supreme Court denied certiorari, 356 U.S. 958 (1958).

VI-C.

The United States Supreme Court, Affirming or Dismissing Appeals from a Long Series of Lower Court Cases Upholding the Sunday Closing Laws of Many States, has Recognized their Character as Social and Economic Legislation, and has Consistently Rejected Arguments that Such Legislation is Unconstitutional, either on Religious Freedom Grounds, or on Grounds of Equal Protection and Due Process.

In a consistent series of cases beginning in 1896 and continuing down to the present time the Supreme Court of the United States has affirmed State or lower Federal court judgments upholding Sunday closing laws as social regulations, or has dismissed appeals from such judgments on the ground that no substantial Federal question was presented.

California:

In 1885 the Supreme Court affirmed the refusal of the United States Circuit Court for the District of California to issue a writ of habeas corpus to one Soon Hing. Hing had been arrested for keeping his laundry open during the night-time, in violation of a San Francisco ordinance which also forbade Sunday laundering. As there was no charge of a Sunday violation, the Sunday closing feature of the

ordinance was not directly involved; but Mr. Justice Field, writing the opinion for affirmance, wrote:

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficient and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

Soon Hing v. *Crowley*, 113 U.S. 703, 707, 710 (1885). That opinion has since been widely accepted and cited as justifying the constitutionality of Sunday closing laws.

Georgia:

In 1896 a Georgia statute restricting the running of freight trains on Sunday was upheld by the United States Supreme Court in *Hennington* v. *Georgia*, 163 U.S. 299. The defendant, a railroad executive, in a State prosecution had unsuccessfully set up the Commerce Clause of the Federal Constitution as a defense. His conviction was affirmed by the Supreme Court of Georgia, and was again affirmed by the Supreme Court of the United States.

Mr. Justice Harlan wrote the Court's opinion in *Hennington* v. *Georgia*. Of the character of the Georgia statute he wrote (see 163 U.S. at pages 303-304):

> "In what light is the statute of Georgia to be regarded? The well-settled rule is, that if a statute purporting to have been enacted to protect the public

health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 350.

"In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath Day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the State committed these matters to the determination of the legislature. If the law making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wis-

dom in the enactment of laws under powers clearly conferred upon the legislature. The legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was 'of admirable service to a State, considered merely as a civil institution.' 4 Bl. Com. #63. . . ."

Minnesota:

In 1900 a unanimous Supreme Court, affirming the Supreme Court of Minnesota, in *Petit* v. *Minnesota,* 177 U.S. 164, upheld a Sunday closing statute specifying barbering as not within the familiar charity and necessity exception to a comprehensive Sunday closing law. Mr. Chief Justice Fuller, in the opinion of the Supreme Court of the United States, wrote of cessation from labor as—

". . . a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society," and added, "Well-nigh innumerable decisions of the state courts have sustained the validity of such laws." (Page 165.)

Virginia:

A corporation operating a miniature golf course sought to enjoin the enforcement of a Sunday closing statute, relying upon Fourteenth Amendment arguments. A three-judge Federal District Court in 1931 denied an interlocutory injunction, stating that, although the statute could not be enforced were it a religious observance, its aim was in fact to prevent the ills of uninterrupted labor. *Broad-Grace Arcade Corp.* v. *Bright,* 48 F. 2d 348 (D.C. E.D. Va. 1931). In the United States Supreme Court the order denying the interlocutory injunction was affirmed *per*

curiam, "but without prejudice to the power and duty of the District Court, as specially constituted, to inquire and determine whether the court has jurisdiction . . . both in relation to the amount involved in the controversy . . . and with respect to the right of the complainant to maintain this suit in equity . . ." 284 U.S. 588 (1931).

New York

The New York Court of Appeals, in *People* v. *Friedman*, 302 N.Y. 75, 96 N.E. 2d 184 (1950), was concerned with New York legislation strikingly like that of Massachusetts. The New York legislation originated in the 17th century, and at that time reflected a religious impulse. By 1950 it had been denominated "Penal Law, Article 192-Sabbath"; it contained a general prohibition of Sunday labor, save for works of necessity and charity; it contained various specific prohibitions of Sunday trades; and there were numerous specific exceptions to the prohibitions. The two defendants were charged with and convicted of public selling and offering for sale uncooked meat in violation of the statute. They appealed to the New York Court of Appeals, which *per curiam* affirmed the conviction. The *per curiam* opinion included the following (see 302 N.Y. 75, 79, 96 N.E. 2d 184, 186):

> "Nor may we say that s 2147 of the Penal Law is unconstitutional because of infringement upon religious freedom. It is not a 'law respecting an establishment of religion, nor prohibiting the free exercise thereof' (U.S. Const., 1st Amendt.). It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's own con-

science, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. Although the so-called Sunday laws may be said to have had a religious origin, our statute since 1881 (Penal Code, s 259, now Penal Law, s 2140) has also recognized that the first day of the week by general consent is set apart 'for rest', in accord with the general experience of mankind that it is wise and necessary to set apart such a day at stated intervals for both the physical and moral welfare of the members of a State or community. The power of the Legislature to regulate the observance of Sunday as a civil and political institution is well settled. (*Soon Hing* v. *Crowley*, 113 U.S. 703, 710; *Hennington* v. *Georgia*, 163 U.S. 299, 314, 317; *Petit* v. *Minnesota*, 177 U.S. 164, 165.)"

The defendants sought review in the Supreme Court of the United States. Their statement of jurisdiction shows that their appeal presented the question whether the New York Sabbath Law was "a law respecting an establishment of religion," invalid under the First Amendment, "made applicable to the States by the Fourteenth Amendment"; whether the New York statute unconstitutionally denied freedom of religion because of its failure to exempt persons recognizing a day other than Sunday as a "holy day of rest"; whether the New York Sabbath law by reason of what the appellants there called a "crazy quilt" pattern of inclusions and exclusions, arbitrary, discriminatory, therefore denying equal protection and due process under the Federal Constitution; and finally whether the New York Sabbath Law was discriminatorily applied against the defendants and persons similarly sit-

uated, thus violating the equal protection guaranties of the Federal Constitution. The Supreme Court of the United States dismissed the appeal without opinion. *Friedman* v. *People of New York*, 341 U.S. 907 (1951). Such a dismissal is a disposition on the merits of the case, and an authoritative precedent. See *Ohio, ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959); *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854 (1949); and other authorities cited by the Court in *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley*, 179 F. Supp. 944 (D.C. E.D. Pa. 1959) at page 949, footnote 4.

North Carolina:

In 1953 the Supreme Court of North Carolina affirmed a conviction of one McGee for operating a drive-in moving-picture theater during hours prohibited on Sunday by a municipal ordinance. McGee in his unsuccessful defense set up the Fourteenth Amendment, arguing that the ordinance imposed invalid classification; it was "arbitrary and unreasonable"; and that it conflicted with the First Amendment. The State Supreme Court discussed and rejected all these contentions, stating, of the religious argument:

> "It so happens that the great majority of people desire to observe Sunday as the day of rest. And measures for its observance do not come from a desire to impose upon the conscience of the individual, but rather to promote public health, the general welfare, safety and morals of the people and to give them an opportunity to rest from their secular activities. . . . And the fact that an ordinance may require the cessation of secular pursuits on Sunday during

the hours in which church going people usually attend religious services, will not be held unconstitutional, if otherwise reasonable and valid."

State v. *McGee*, 237 N.C. 633, 644, 75 S.E. 2d 783, 790 (1953). The Supreme Court of the United States dismissed the defendant's appeal with a *per curiam* notation of the want of a Federal question. *McGee* v. *North Carolina*, 346 U.S. 802 (1953). A similar result occurred in *State* v. *Towery*, 239 N.C. 274, 79 S.E. 2d 513 (1954); appeal dismissed for want of a substantial Federal question, 347 U.S. 925 (1954).

New Jersey:

In 1956 the Supreme Court of New Jersey, in *Gundaker Central Motors, Inc.*, v. *Gassert*, 23 N.J. 1, 127 A. 2d 566, upheld a statute requiring automobile dealers to close on Sunday. The opinion described the economic and social background of the legislation. The Supreme Court of the United States dismissed an appeal for want of a substantial Federal question. *Gundaker Central Motors, Inc.*, v. *Gassert*, 354 U.S. 933 (1957).

Ohio:

In 1958 the Supreme Court of Ohio affirmed a series of convictions of that State's Sunday closing legislation. That Court rejected a religious argument, and found Sunday legislation a provision for a day of rest, requisite for moral and physical well-being. *State* v. *Kidd*, 167 Ohio State 521, 150 N.E. 2d 413; appeal to Supreme Court of United States dismissed for want of a substantial Federal question, 358 U.S. 132 (1958).

Pennsylvania:

In 1958 the Supreme Court of the United States also dismissed for want of a substantial Federal question an appeal from the Superior Court of Pennsylvania, which had affirmed a lower court conviction for showing motion pictures at a drive-in theatre. The State opinion dealt with questions of free expression, due process, and unreasonable classification. *Commonwealth of Pennsylvania* v. *Grochowiak,* 184 Pa. Super. 522, 136 A. 2d 145 (1957); appeal dismissed for want of a substantial Federal question, 358 U.S. 47 (1958).

Note: for the sake of completeness, two other cases should be cited in which the Supreme Court of the United States dismissed appeals from lower court judgments upholding the constitutionality of Sunday legislation. After the New York Court of Appeals upheld a conviction for Sunday barbering despite Fourteenth Amendment arguments of unequal protection, in *People* v. *Havnor,* 149 N.Y. 195, 43 N.E. 541 (1896), the barber's writ of error in the Supreme Court of the United States was dismissed because the writ of error was not allowed by the Chief Judge of the State court. 170 U.S. 408 (1898). And in *Brunswick-Balke-Collender Co.* v. *Evans,* 228 Fed. 991 (D.C. D. Ore. 1916), a three-judge United States District Court refused to enjoin an Oregon Sunday closing law despite the plaintiff's arguments, under the Fourteenth Amendment Due Process and Equal Protection Clauses, that freedom of religion was impaired and that classification of occupation was arbitrary. The plaintiff appealed to the Supreme Court of the United States, which in 1918 dismissed the appeal on the appellees' motion, 248 U.S. 587, no one opposing. The official edition, United States Reports, lists this dismissal under "Cases disposed of without consideration by the Court."

VI-D.

The Sunday Closing Legislation in Massachusetts, General Laws, Chapter 136, as Applied to Defendant Crown Kosher Super Market of Massachusetts, Inc., is Not Unreasonable, in Classification or Otherwise, and does Not Contravene the Equal Protection or Due Process Clauses; the Wide Adoption of Such Legislation in the Various States and Elsewhere, and its Constitutional Approval by the Vast Majority of State Courts; so Demonstrates.

The Federal Constitution, Acts of Congress and legislation of various sorts in the fifty States and in Puerto Rico make special provisions for Sunday as a "day off." The vast majority of courts before whom such legislation has come have held it constitutional as social and economic regulation. Similar legislation exists in other countries. This widespread consensus of opinion demonstrates the reasonableness of legislation making Sunday a "day off," on which people can rest and seek amusement, away from pressure to work. It similarly demonstrates the wide concurrence of agreement that reasonable exceptions to the application of the statutes are within the legislative discretion.

Muller v. *Oregon*, 208 U.S. 412 (1908), established the usefulness, in demonstrating the constitutionality and reasonableness under the Fourteenth Amendment canon, of legislation regulating periods of work. The opinion of the United States Supreme Court, unanimously upholding an Oregon ten-hour-day law for women, commented on the brief filed by Mr. Louis D. Brandeis for the State of Oregon, which cited similar legislation in a long list of States, and in foreign countries. It also cited reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, etc. See 208 U.S. 419, 420.

Of some of this material Mr. Justice Brewer wrote for the unanimous Court (pages 420, 421):

> "The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

Analysis of widespread Sunday legislation in the United States and elsewhere:

Sunday legislation provisions can be classified in five principal types. A common sort of provision excepts Sunday from days on which governmental action can be taken, or on which legal steps are required to preserve rights. An example is section 85 of the Uniform Negotiable Instruments Law, making an instrument which by its terms

is due on Sunday come due on the next business day. Another type of statute suspends civil process on Sunday; courts are often directed not to sit. Article I, section 7, clause 2, of the Constitution of the United States gives the President ten days "(Sunday excepted)" to study an Act of Congress in order to decide on a possible veto. Some legislation of this category occurs in every one of the fifty States. It is so common, and so universally accepted, that we do not attempt to include it in the tabulation in Appendix B.

Another common type, found in thirty-four States and in Puerto Rico, is termed "comprehensive prohibition" in Appendix B of this brief. Such legislation very frequently coexists with other types. The "comprehensive prohibition" in Massachusetts, fairly typical of the thirty-three other States and Puerto Rico, is General Laws, chapter 136, section 5:

> "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars."

In forty-six States occur various "specific prohibitions," often coexisting with comprehensive prohibitions, as Appendix B demonstrates. Some of Massachusetts' specific prohibitions occur in General Laws, chapter 136, sections 2 and 3, which prohibit Sunday participation in various games, public diversions and entertainments. See Appendix A to this brief, pages 80 to 81, where General Laws, chapter 136, is set forth in full.

In twenty-two States occur what in Appendix B are denominated "Sabbatarian exemptions," which grant some

legal leeway in the application of its Sunday laws to those who observe some day other than Sunday as a Sabbath. Massachusetts has a provision of this type, in a portion of the long and complex section 6 of chapter 136 of the General Laws:

> ". . . Nor shall it [referring to the comprehensive prohibition of the preceding Section 5] prohibit . . . the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.
>
> "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby, . . ."

In forty-one States occur what Appendix B terms "Essential and Recreational Exceptions." These grant dispensations from what would otherwise be Sunday restrictions. They permit such essential activities as the sale of medical supplies or the maintenance of electric light service; and allow such recreational activities as may add pleasure and gaiety to the day off for those released from pressure to work by the wider prohibitions of Sunday business. Massachusetts examples occur in chapter 136, section 6, which permits a long list of Sunday activities of this character—live bait can be sold for the man out for a Sunday's fishing; the Sunday ride in the family car on

country roads can be enlivened by a stop at a roadside stand where a farmer sells his home-grown apples or pumpkins. Such exceptions inevitably involve nice legislative distinctions. The Massachusetts legislator had to decide whether commercial pressure on employees of gasoline sellers to work on Sunday was compensated for by the convenience and pleasure Sunday gasoline would give to automobilists and motor-boaters.

Reasonable men may differ as to the policy of some such classifications but such differences of judgment do not rise to the point of unconstitutionality under the Equal Protection Clause of the Fourteenth Amendment. Litigants in the many attempts to invalidate Sunday laws have frequently pointed out the small difference which thus separates the forbidden from the permissible. The opinion of Chief Judge Magruder in the present case comments on the fact that Sunday clam-digging is permitted in Massachusetts while Sunday oyster-dredging is forbidden (176 F. Supp. 476, footnote 4, Record, page 147). Judge McCarthy in his dissent points out (176 F. Supp. 489, footnote 6, Record, pages 168, 169) that clams are dug for sport at low tide, while oyster-dredging is characteristically commercial. This sort of distinction should not be reviewed and reversed by the judiciary even if judges differ from the legislators as to the substantiality of the difference of circumstances.

Such fine distinctions in legislation are inevitable at the point where two conflicting policies meet and the legislators have to make specific choices. When twenty years of adverse possession cuts off a landowner's rights, the policy difference between nineteen years and three hundred and sixty-four days on the one hand, and the full period of twenty years on the other, becomes difficult to see. But legislators have to run a line; and there is a justification in the policy that a line be drawn.

Sunday closing legislation has, of course, long been familiar in countries other than the United States. See, *e.g.*, Holmested, The Sunday Law in Canada (1912), and English history of Sunday laws discussed therein. Prior to 1940 the Soviet Union experimented with every fifth and every sixth calendar day of rest. In 1940 it restored Sunday as the general day of cessation of labor. Bulletin of the Supreme Soviet of the U.S.S.R. (Vedomosti Verkhovno Soveta CCCP), No. 20(83), 5 July, 1940, page 1, column 1.

State adjudication upholding reasonableness of Sunday legislation:

In thirty-nine States, in Puerto Rico and in the District of Columbia there are appellate or highest State court decisions or three-judge Federal court decisions holding Sunday legislation valid despite attack on State or Federal constitutional grounds.[1] From ten States one or more appeals from such judgments of validity have been taken to the Supreme Court of the United States, which has in each case either affirmed the lower court or dismissed the appeal—in two such cases dismissing without reaching any question involving merits.

In fifteen of these thirty-nine States, and in one other (Arizona) there have been, at one time or another, State court holdings that some Sunday statute or municipal or-

[1] Alabama, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. See Appendix B for case names.

dinance was invalid.[2] In only one of such States (prior to the decision of the District Court herein) has a Sunday closing law ever been held unconstitutional on religious grounds (unless mention should also be made of *Commonwealth* v. *Cavalerro*, Court of Quarter Sessions, Philadelphia County, Pa., April 20, 1960, apparently unreported). In 1858 the Supreme Court of California held a Sunday closing law invalid under a clause in the State Constitution forbidding religious "discrimination or preference." See *Ex parte Newman*, 9 Cal. 502 (1858). Three years later this case was overruled in *Ex parte Andrews*, 18 Cal. 678 (1861), with an opinion rejecting Chief Justice Terry's opinion in the earlier case, and adopting the prior dissent of the then Associate later Chief Justice Field.

In none of the other sixteen States has there ever been a State Supreme Court or Federal court holding that a Sunday law was unconstitutional either under a State or under the Federal Constitution on religious grounds, until the judgment of the Federal District Court in the case at bar. An annotation in the Rocky Mountain Law Review wrote of the *Crown Kosher* decision below herein in the three-judge court: "The *Crown Kosher* decision now stands as an isolated judicial monument—a constitutional holding unparalleled since *Ex parte Newman* decided over a century ago." 32 Rocky Mountain Law Review, 243, 245 (1960). No holding in any one of those sixteen states invalidates a whole Sunday closing program. Arizona held a municipal ordinance of Yuma invalid because inconsistent with the general State Sunday law.[3] Ten-

[2] Arizona, California, Colorado, Florida, Illinois, Indiana, Missouri, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Oregon, Tennessee, Utah, Washington. See Appendix B for cases.

[3] *Elliott* v. *State*, 29 Ariz. 389, 242 P. 340 (1926).

nessee held invalid a State statute because two subjects (barbering and bath-houses) were included in the same statute, contrary to a State constitutional provision. New Jersey, Missouri, Indiana and other states have held invalid specific provisions on the ground that they were so limited in their application as to conflict with State constitutional prohibitions against "special acts" or "special legislation."[4] Some of the rest of these fifteen cases go off on "improper" classification without specifying whether the court is considering a State or the Federal Constitution. It is often impossible to tell from the opinion which is meant. The tendency of some State courts to decide more rigorously against economic legislation than the United States Supreme Court would do has been the subject of some recent comment. See A. M. Horn, "Judicial Power over Policy under State Constitutions," VI Public Policy, Galbraith and Friedrich, Eds., 1956; and R. V. Carpenter, "Economic Due Process and the State Courts," 45 Amer. Bar Ass'n Journal 1027 (Oct. 1959).

Florida came closest to a sweeping invalidation of Sunday closing laws in decisions in 1952 and 1957.[5] Even these adjudications left in force some specific prohibitions, and the Florida Legislature in 1959 passed a new law forbidding Sunday sales of automobiles, reciting in its text economic justifications on non-religious grounds of convenience and safety.[6] In all sixteen States except Florida

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[4] *Sarner* v. *Union Township, Union County*, 55 N.J. Super. 523, 151 A. 2d 208 (1959). *McKaig* v. *Kansas City*, 363 Mo. 1033, 256 S.W. 2d 815 (1953). *Armstrong* v. *State*, 170 Ind. 188, 84 N.E. 3 (1908). See the tabulation in Appendix B *passim*.

[5] *Henderson* v. *Antonacci*, 62 So. 2d 5 (1952); and *Kelly* v. *Blackburn*, 95 So. 2d 260 (1957).

[6] Florida 1959 Laws, chapter 59-295, Regular Session, 37th Legislature.

and Arizona decisions upholding Sunday closing laws exist in full force side by side with the invalidating decisions which have special local grounds. Arizona's decision implicitly upholds its general State Sunday closing law. And the Florida Legislature in 1959 hopefully tried again.

One of the points most stressed by the plaintiffs herein before the three-judge court was the hardship caused to them by their religious restrictions on Saturday when combined with their statutory restrictions on Sunday. Similar contentions have been unsuccessfully raised in six State Supreme Courts, and *semble* in two others. In one such case, *Friedman* v. *New York*, 341 U.S. 907 (1951), the Supreme Court of the United States dismissed an appeal as presenting no substantial Federal question. In no such case until *Crown Kosher* below has this point been successfully contended for by a Saturday sabbatarian. See Appendix B, Alabama, Arkansas, Michigan, Missouri, New York, Pennsylvania and *semble* Maryland and South Carolina.

The adjudicatory tableau, then, can be generally described thus: The Supreme Court of the United States has never held invalid any Sunday closing law. In the minority of States in which there are adjudications of invalidity of specific local ordinances or statutes there are reasons of restricted application given for the invalidation, not suggesting that the State reject Sunday closing legislation on any ground like that in *Crown Kosher Super Market* v. *Gallagher*, 176 F. Supp. 466 (D.C. D. Mass. 1959). *Crown Kosher* is unique.

The majority opinion of the three-judge court in the case at bar cites six Sunday closing State decisions to justify its conclusion—State cases from Illinois, Florida, Ne-

braska, Missouri, Colorado and Oklahoma. See 176 F. Supp. 475, 476, Record, page 146.

In addition, the majority below at that point cites one opinion of the Supreme Court of the United States, *Smith* v. *Cahoon*, 283 U.S. 553 (1931). The *Cahoon* case finds that classification in a Florida statute is "entirely arbitrary" and therefore that the equal protection clause is violated. A Florida statute required private carriers for hire to procure a certificate of public convenience and necessity and to make certain payments to the State, but excluded persons operating school buses and persons transporting certain agricultural, dairy and fish products to primary markets. The Supreme Court, with an opinion by Mr. Chief Justice Hughes, found that there was no justification for making a distinction between those who carried for hire the excepted items and those who carried for hire bread or sugar or tea or coffee or groceries in general or other useful commodities. No question of any Sunday law was involved. Furthermore, the attitude of the Supreme Court of the United States toward economic regulation was quite different in 1931 from its attitude twenty-nine years later, as evidenced by the series of Supreme Court dismissals of appeals in Sunday closing cases, set forth in this brief, pages 56 to 64.

Of the other six cases, all except that arising in Florida involve local ordinances, and in each there is a finding that the ordinance is in conflict with some provision of the State Constitution or with a State statute. The Missouri, Colorado, Oklahoma, Nebraska and Illinois cases all turn on classifications. The ordinances are found to be invalid

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[8] *City of Springfield* v. *Smith*, 322 Mo. 1129, 19 S.W. 2d 1 (1929); *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1938); *City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E. 2d 52 (1938); *Ex parte Hodges*, 83 P. 2d 201 (Okla. Cr. 1938); *Arrigo* v. *City of Lincoln*, 154 Neb. 537, 48 N.W. 2d 643 (1951); *Henderson* v. *Antonacci*, 62 So. 2d 5 (Fla. 1952).

as "special legislation." The Illinois case goes off under the State Due Process Clause on the ground that the classifications are unjustified; such provisions, the Court finds, as that closing establishments of dressmakers or milliners while cigar stores are permitted to be open invalidate the legislation. It is notable that in each of these five States, Missouri, Colorado, Oklahoma, Nebraska and Illinois, there are other adjudications upholding Sunday closing laws. See the tabulation in Appendix B of this brief. The ordinances struck down were so ruled on because of their specific provisions; and such decisions of invalidity, turning on State grounds, cannot be reviewed by the Supreme Court of the United States. *New York City* v. *Central Savings Bank*, 306 U.S. 661 (1939). The Florida case invalidates a Florida Sunday closing statute as applied to the operator of a used-car lot. The law is found unconstitutional, whether under a clause of the State Constitution or under some clause of the Federal Constitution is not clear. The ground appears to be the unjustified character of the classification involved. The Florida Legislature, undisturbed by findings of unconstitutionality, has since attempted in its 1959 session to draft a new statute setting forth adequately the reasons for imposing Sunday closing on car lots. See Florida Laws, 1959, chapter 59-295.

The overwhelming weight of State authority is thus in favor of the validity of statutes such as that in Massachusetts. The cases relied on by the three-judge court below are in conflict with this mass of authority and can perhaps be explained by the willingness of a few State Supreme Courts to find unconstitutionality on economic grounds under State Constitutions. See Carpenter, "Economic Due Process and the State Courts," 45 Amer. Bar Ass'n Journal 1027 (October, 1959).

The great predominance of adjudications in State Supreme Courts finding Sunday closing statutes constitutional, set forth in the tabulation, Appendix B of this brief, becomes more impressive when it is recalled that in every State Constitution there is in some form a guaranty of freedom of religion. These provisions concerning religious liberties are noted in Appendix B in a separate column for each State. The State Supreme Courts have found that Sunday closing statutes constitute no violation of the clauses of the respective State Constitutions guaranteeing a separated Church and State, and assuring freedom of religion. See the discussion at pages 70-71 of this brief. This strong consensus should be persuasive on the Supreme Court of the United States when it considers the same subject. The judgment below should be reversed and the Massachusetts legislation should be declared constitutional.

VI-E.

The Facts, as Established by Testimony or Stipulation, do Not Show Unconstitutionality of Massachusetts Sunday Closing Laws as Applied to Any Plaintiff.

The inferences most favorable to the several plaintiffs herein which could be drawn from the testimony and stipulation of facts herein still do not demonstrate any unconstitutionality of the Massachusetts Sunday closing legislation, either on its face or as applied to any plaintiff. No good purpose would here be served by repeating at length the convincing demonstration in the opinion of the three-judge Federal District Court in *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley*, 179 F. Supp. 944 (D.C. E.D. Pa. 1959), at page 948, that the *Friedman* case arising in New York, 341 U.S. 907 (1951), is on its facts a complete

paralled for the Massachusetts case now at bar. No evidence has been adduced to take the Crown Kosher Super Market, or any other plaintiff herein, out of the rule established in *Friedman*. *Friedman*, and the other mass of United States Supreme Court adjudications arising in eight States, set forth at pages 56 to 64 of this brief, should govern the disposition of the case at bar, and call for a reversal.

VI-F.

The Decree Herein is Not Justified by the Opinion of the Three-Judge District Court.

The decree herein, Record, page 176, contains two numbered subparagraphs, the first of which declares section 5 of chapter 136 of the Massachusetts General Laws "unconstitutional, void and unenforceable as applied to" the plaintiff "insofar as it requires the Crown Kosher Super Market of Mass., Inc., to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday; . . ."

The second numbered subparagraph of the decree provides—

> "(2) that the defendant, his agents, servants, and employees, and all others acting in his behalf, be, and they hereby are, enjoined and restrained from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce section 5 of said Chapter 136 of the Massachusetts General Laws (Ter. Ed.) as amended, against the plaintiffs in this action; . . ."

For the reasons set forth above under heading VI-E of this argument, pages 76 and 77 of this brief, the opinion of the three-judge court below, which constitutes its find-

ings of fact and conclusions of law, does not justify any decree of unconstitutionality herein, either on the face of the statute or affecting the statute as applied.

In addition to this, however, the decree is confusing and, if the judgment herein were to be affirmed by the Supreme Court of the United States, enforcement of the law by public officers in Massachusetts would be puzzling and difficult. The plaintiffs do not dispute that the religious scruples of those active in the Crown Kosher Super Market would still permit it to be opened on Saturday evening. See the stipulation of fact, paragraph 1. If the Crown Kosher Super Market should decide to stay open on Saturday evenings, would the decree herein cease to have any effect?

Furthermore, the opinion of the Court details with some particularity the distant residences of the plaintiff customers. Should the public authorities of Massachusetts gather that the statute is unconstitutional only as applied to a super market having customers dwelling at a substantial distance, as in the present case? Or should the public authorities take it that the decree, while in terms limited, is in effect a striking out of the statute from the books?

The appellants feel that the decree is unjustified by the opinion and by the evidence. They submit that the shortcomings pointed out concerning the decree furnish an additional reason why the judgment below should be reversed.

Conclusion.

The appellants contend that the proper disposition of this case in the Supreme Court is reversal of the judgment of the Federal three-judge court below, and dismissal of the plaintiff's complaint, on the authority of *Friedman* v. *People of New York*, 341 U.S. 907 (1951), and of the other

adjudications of the Supreme Court of the United States set forth in this brief, pages 56 to 64, inclusive.

If, for some reason not apparent to the appellants, the Supreme Court should decide not to dismiss, the appellants suggest that at least the Supreme Court should find that the three-judge District Court was in error in denying the motion made by the defendants for a new trial. The Supreme Court should remand the case for further hearings, to the end that a full record may be made; that the business situation of the corporate plaintiff's super market may be more fully developed by evidence; that remaining uncertainties in the application of the Sunday closing laws may be clarified by appropriate State court adjudication; and in short that the actual situation, on the basis of which a judgment is asked which will uproot Sunday legislation throughout the United States, may be adequately brought before the Supreme Court.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General of Massachusetts,

JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,

ARTHUR E. SUTHERLAND,

S. THOMAS MARTINELLI,
City Solicitor, Springfield, Massachusetts,

JOHN WARREN McGARRY,
Assistant Attorney General,

Attorneys for Appellants.

Appendix A.

Massachusetts General Laws.

Chapter 136.

Observance of the Lord's Day.

Section 1. [Lord's day, definition.] The Lord's day shall include the time from midnight to midnight.

Section 2. [Presence at games, sports, plays or public diversions on the Lord's day; exceptions.] Whoever on the Lord's day is present at a game, sport, play or public diversion, except a concert of sacred music, a public entertainment duly licensed as provided in section four or a free open air concert given by a town, or by license of the mayor or the selectmen, upon a common or public park, street or square, or except a game of golf conducted on an open air golf course, or except a game of tennis or dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing, or except after one o'clock post-meridian a game of outdoor lawn bowling or the playing of golf or driving on an outdoor golf driving range or playing on a miniature golf course, so called, shall be punished by a fine of not more than five dollars. Whoever on the Lord's day takes part in any game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not more than fifty dollars. This and the following section shall not apply to amusement enterprises lawfully conducted under section four A or four B or to sports or games conducted in accordance with sections twenty-one to twenty-five, inclusive, in any city or town which accepts said sections or in accordance with sections twenty-six to thirty-two, inclusive, in any city or town in which said sections twenty-six

to thirty-two are then in force. [As revised by St. 1956, c. 212, sec. 256.]

SECTION 3. [Establishing and maintaining public entertainment on the Lord's day.] Whoever offers to view, sets up, establishes, maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining any public entertainment on the Lord's day, except as provided in section two, unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four, or whoever on the Lord's day acts as proprietor, manager or person in charge of a game, sport, play or public diversion, except a public entertainment licensed under section four and except as provided in section two, shall be punished by a fine of not more than five hundred dollars. [As revised by St. 1955, c. 255, sec. 2.]

SECTION 4. [License to hold public entertainment on the Lord's day; application; fee; suspension; revocation; hearing.] Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, including musical entertainment provided by mechanical or electrical means, in keeping with the character of the day and not inconsistent with its due observance, whether or not admission is to be obtained upon payment of money or other valuable consideration, and, if the proposed entertainment described in the application is solely for the exhibition of motion pictures, for the benefit of patrons in a public dining room or for the use of television, the use of

radio, or musical entertainment provided by mechanical or electrical means, the mayor or selectmen may grant an annual license therefor; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. The application for the approval of the proposed entertainment by the commissioner shall be accompanied by a fee of two dollars, or, in the case of an application for the approval of an annual license, as herein provided, by a fee of fifty dollars. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. The foregoing provisions, insofar as they authorize any person to refuse to grant, or to suspend, revoke or annul a license upon the ground that the proposed entertainment is not in keeping with the character of the Lord's day or not consistent with its due observance, and insofar as they require written approval of the proposed entertainment by said commissioner, shall not apply to any person making an application for a license to exhibit motion pictures or for the use of radio or television on said day, nor to any license issued upon such application. [As revised by St. 1954, c. 303 and St. 1957, c. 300; and as added by St. 1955, c. 742 and as ameended by St. 1956, c. 157.]

SECTION 4A. [Maintenance and operation of enterprises at amusement parks, beaches or resorts on the Lord's day; licenses; suspension; revocation.] The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe,

may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely:—Bowling alleys, shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre, photographic galleries or studios in which pictures are made and sold, games, and such amusement devices as may lawfully be operated therein on secular days; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed enterprise shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as provided in the case of public entertainments under section four. Any licensee hereunder may distribute premiums or prizes in connection with any game or device lawfully maintained and operated by him under authority hereof. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. So much of this section as relates to the maintenance and operation of bowling alleys shall not apply in any city or town which shall have accepted the provisions of section four B. [As revised by St. 1933, c. 309, sec. 1 and as amended by St. 1946, c. 207, sec. 2.]

SECTION 4B. [Licenses for operation of bowling alleys on the Lord's day.] In any city which accepts this section by vote of its city council and in any town which accepts this section by vote of its inhabitants, the city council, with the approval of the mayor, or the selectmen, as the case may be, may grant licenses for the operation of bowling

alleys on the Lord's day between the hours of one and eleven post meridian; provided, that no such license may authorize the operation of bowling alleys on Easter, or on Christmas day if such day falls on the Lord's day. Every license granted hereunder shall specify the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Bowling alleys operated under such licenses shall be operated subject to such regulations and restrictions as shall be prescribed from time to time by the city council, with the approval of the mayor, or by the selectmen. Said regulations and restrictions shall be stated in the license. Said licensing authorities may at any time and without previous notice revoke licenses issued under this section if they have reason to believe that any provision of this section, or of any regulation or restriction prescribed thereunder, is being or will be violated. [As added by St. 1946, c. 207, sec. 3.]

SECTION 5. [Keeping open shops or warehouses and conducting business or doing work on the Lord's day.] Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

SECTION 6. [Limit of operation of section 5.] The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to pro-

ceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four

o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. [As revised by St. 1934, c. 373, sec. 6; St. 1946, c. 207, sec. 4; and St. 1957, c. 356, secs. 16 and 17; as added by St. 1949, c. 190 and St. 1950, c. 322; and as amended by St. 1959, c. 256, sec. 1.]

SECTION 7. [Sale of frozen desserts, frozen dessert mix or confectionery on the Lord's day.] In Boston, and in any other city or town which accepts this section and section eight or has accepted corresponding provisions of earlier laws, in a city by its city council or in a town by the voters of the town at an annual town meeting, the licensing board or officer in such city or town, or if there is no such board or officer the aldermen of a city, or if there are no aldermen the city council, with the approval of the mayor, or the selectmen of a town, may grant, to any reputable person who on secular days is a retail dealer in frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit and who does not hold a license for the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, a license to keep open his place of business on the Lord's day for the sale of frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit. [As revised by St. 1957, c. 356, sec. 18.]

SECTION 8. [Provisions of licenses to sell frozen desserts, ice cream mix or confectionery on the Lord's day;

fee; revocation.] Every license granted under the preceding section shall specify the street or place and the number, if any, or if there is no number, the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Such licenses shall expire on April thirtieth of each year; but they may be granted during April, to take effect on May first following. The fee for such license shall not be more than five dollars a year, and it may be suspended or revoked by the officer or board granting the same. [As amended by St. 1937, c. 124.]

SECTION 9. [Permit for performance of necessary work or labor on the Lord's day.] The police commissioner of Boston, or any member of the police department having a rank not lower than that of captain and designated by said commissioner, or the chief of police or other officer in charge of the police department of any other city or of any town, or the chairman of the board of selectmen of any town, upon such terms and conditions as he deems reasonable, may issue a permit for the performance on the Lord's day of necessary work or labor which in his judgment could not be performed on any other day without serious suffering, loss, damage or public inconvenience. Such permit shall cover not more than one day and shall not be issued more than six days prior to the day for which it is issued. [As amended by St. 1953, c. 108.]

SECTION 10. [Parades with music on the Lord's day.] Any post or camp of an incorporated organization of veterans of any war in which the United States has engaged, or any incorporated civic or fraternal organization, may parade with music on the Lord's day for the purpose of attending divine service, holding commemorative exercises or dedicating memorials; provided, that the music shall be suspended while passing within two hundred feet

of any place of public worship where services are being held.

SECTION 11. [Parades of policemen or firemen with music on certain Sundays.] Any company or association of policemen or firemen, whether in active service or former members of a police or fire department, may parade with music, in the case of policemen, on policemen's memorial day, the first Sunday of June in each year, and, in the case of firemen, on firemen's memorial day, the second Sunday of June in each year, for the special purpose of decorating the graves of deceased policemen or firemen, as the case may be; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held.

SECTION 12. [Entertainment of travelers or strangers in places of public entertainment.] Whoever, keeping a house, shop, cellar or place of public entertainment or refreshment, entertains therein on the Lord's day any persons other than travelers, strangers or lodgers, or suffers such persons on said day to remain therein or in the yards, orchards or fields appertaining thereto, drinking or spending their time idly or at play, or in doing any secular business, shall for a first offence be punished by a fine of not more than fifty dollars for each person so entertained or suffered so to remain; and for a subsequent offence by a fine of not more than one hundred dollars; and if convicted three times, he shall thereafter be disqualified to hold a license.

SECTION 13. [Service or execution of civil process on the Lord's day; service by publication.] A civil process shall not be served or executed on the Lord's day, and such service if made shall be void, and the person who serves or executes it shall be liable in damages to the person aggrieved in like manner as if he had no such process; pro-

vided, that this section shall not apply to service of such process by publication in a newspaper published on the Lord's day. [As amended by St. 1932, c. 105.]

SECTION 14. [Rude or indecent behavior in houses of public worship.] Whoever on the Lord's day behaves rudely or indecently in any house of public worship shall be punished by a fine of not more than ten dollars.

SECTION 15. [Limitation of the commencement of prosecutions.] Prosecutions for penalties incurred under the preceding provisions of this chapter shall be commenced within six months after the offence was committed.

SECTION 16. [Inquiry into violations; enforcement.] Sheriffs, constables and grand jurors shall inquire into and inform of all violations of this chapter, and cause it to be enforced.

SECTION 17. [Discharging firearms and fishing on the Lord's day; discharge of firearms in shooting galleries or at field trials.] Whoever on the Lord's day discharges any firearm for sport or in the pursuit of game, or attempts to take or catch any fish by using any net or spear, or attempts to take or catch any fish for commercial purposes by using a hook and line, shall be punished by a fine of not more than ten dollars; provided, that, on said day, shiners may be taken for bait by licensed fishermen, and eels and suckers may be taken with a spear. Prosecutions hereunder shall be commenced within thirty days after the offence was committed. This section shall not apply to the discharge of firearms in any shooting gallery licensed under section four A, or at any field trial licensed under section one hundred and twelve A of chapter one hundred and thirty-one, and subject to the restrictions therein imposed, nor shall it apply to the discharge of firearms, in trap, skeet or target shooting if carried on at such places within the limits of any city or town and dur-

ing such hours as the city council or selectmen approve and in accordance with regulations which they are hereby authorized to establish. [As revised by St. 1938, c. 60 and St. 1955, c. 524, sec. 3.]

SECTION 18. [Punishment of innholders permitting use of implements for gaming on the Lord's day.] Any innholder, common victualler or person keeping or suffering to be kept in any place occupied by him implements such as are used in gaming, in order that the same may for hire, gain or reward be used for purposes of amusement, who, on the Lord's day, uses or suffers to be used any such implements upon any part of his premises, shall for a first offence be punished by a fine of not more than one hundred dollars or by imprisonment for not more than three months; and for a subsequent offence by imprisonment for not more than one year; and in either case shall further recognize, with sufficient sureties, in a reasonable sum for his good behavior, and especially that he will not be guilty of any violation of this section for three months after the date of his recognizance.

SECTION 19. [Repealed. St. 1950, c. 256, sec. 2.]

SECTION 20. [Chapter as defense to action for tort or injury.] The provisions of this chapter shall not constitute a defence to an action for a tort or injury suffered by a person on the Lord's day.

CERTAIN SPORTS AND GAMES PERMITTED ON THE LORD'S DAY.

SECTION 21. [Athletic outdoor sports or games.] In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council, or in any town which accepts said sections by vote of its inhabitants, it shall be lawful on the Lord's day to take part in or witness any athletic outdoor sport or game, as hereinafter provided,

between the hours of one thirty and six thirty post meridian and, in the case of a baseball game commenced before the hour of six thirty post meridian, for such further time beyond said hour as may be necessary to complete said game; provided, that said game had been scheduled to commence at or before the hour of three post meridian, or is the second of two successive games to be played on the same day, the first of which had been scheduled to commence at or before the hour of two post meridian. In any such city or town it shall be lawful on the Lord's day to take part in or witness, as hereinafter provided, any indoor hockey or basketball game between the hours of one thirty post meridian and twelve midnight. [As revised by St. 1954, c. 132.]

SECTION 22. [Licensed playgrounds or parks for athletic outdoor sports or games.] Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

SECTION 23. [Regulations and restrictions governing athletic outdoor sports or games; admission fees.] Such sports or games shall be conducted subject to such regulations and restrictions as shall be prescribed from time to time by the city council or the selectmen; provided, that they shall not prohibit the charging of admission fees or the taking of collections at any such sport or game, nor

shall they prohibit the receiving of remuneration by any proprietor, manager or person in charge of any such sport or game or by any participant therein. Said regulations and restrictions shall be stated in the license or permit.

SECTION 24. [Revocation of permits.] The licensing authorities described in section twenty-two may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provision of sections twenty-one to twenty-five, inclusive, or of any regulation or restriction prescribed under section twenty-three, is being or will be violated.

SECTION 25. [Outdoor exercises not involving element of contest.] Sections twenty-one to twenty-five, inclusive, shall not prohibit participation at other hours on the Lord's day in other outdoor exercise not involving the element of contest, nor shall they permit horse racing, automobile racing, boxing, or hunting with firearms.

SECTION 26. [Athletic outdoor sports or games not involving pecuniary reward, remuneration or consideration.] In any city or town wherein the corresponding provisions of this and the six following sections were in effect on the sixth day of December, nineteen hundred and twenty-eight, and which has not voted against said sections on resubmission as provided in section thirty-one, and has not accepted the provisions of sections twenty-one to twenty-five, inclusive, as provided in section twenty-one, it shall be lawful to take part in or witness any athletic outdoor sport or game, in which the contestants do not receive and have not been promised any pecuniary reward, remuneration or consideration whatsoever directly or indirectly in connection therewith, on the Lord's day between the hours of two and six in the afternoon as hereinafter provided.

SECTION 27. [Licensed playgrounds or parks for athletic outdoor sports or games not involving pecuniary award, remuneration or consideration.] Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

SECTION 28. [Regulations and restrictions governing athletic outdoor sports or games not involving pecuniary reward, remuneration or consideration.] Such sports or games shall be conducted subject to such regulations and restrictions as shall be prescribed by the city council or selectmen, and the same shall be stated in the license or permit.

SECTION 29. [Admission fees.] No admission fee shall be charged directly or indirectly, and no business or other enterprise shall be conducted, and no collection shall be made at any such sport or game.

SECTION 30. [Revocation of permits.] The licensing authorities described in section twenty-seven may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provision of sections twenty-six to twenty-nine, inclusive, or of any regulation or restriction prescribed under section twenty-eight, is being or will be violated.

SECTION 31. [Resubmission of sections 26 to 32 in cities or towns; petition.] In any city or town in which the provisions of sections twenty-six to thirty-two, inclusive, are in force, said sections shall be resubmitted to the voters at a municipal election, if a petition to that effect, signed by not less than ten per cent of the voters, is filed with the city or town clerk not less than thirty days before the election. If, upon such resubmission, a majority of the voters voting thereon vote against said sections, they shall cease to have effect in that city or town.

SECTION 32. [Outdoor exercises not involving element of contest.] Sections twenty-six to thirty-one, inclusive, shall not prohibit participation at other hours on the Lord's day in other outdoor exercises not involving the element of contest, nor shall they permit horse racing, automobile racing, boxing, or hunting with firearms.

Appendix B.

Introduction.

Explanation of Table of State Sunday Closing Legislation and Adjudication.

The occurrence of Sunday legislation in some form in each of the fifty states of the Union, and as well as in certain other jurisdictions in the United States, the District of Columbia and Puerto Rico, and the occurrence of adjudications in most of these jurisdictions, a great preponderance of which declares the constitutionality of Sunday closing statutes, makes it desirable to have a tabulation of this material readily available for reference purposes in this brief.

In many instances the adjudications upholding the validity of Sunday closing statutes do not specify clearly the nature of the attempted objection to the legislation—specifically whether the asserted objection arises under the State or Federal constitutions or both. Because all State Constitutions contain provisions guaranteeing religious freedom in one form or another, it is desirable to have readily available a reference to such provisions; whenever a State statute is upheld by a State court there is either necessarily an express finding of compliance with the State constitutional provision for freedom of religion, or at the very least there was an opportunity in this litigation for the person attacking the legislation to assert a conflict with such a State constitutional provision. For this reason the tabulation includes a reference to such State constitutional guaranties. Appendix B contains eight columns. The first column from left to right gives the name of the State or other jurisdiction in question. The second column gives a citation to the most recent Sunday legislation in the State in question. The third column gives a reference to

the State constitutional provision guaranteeing religious freedom. The fourth column indicates the presence or absence of what is described in the table as "comprehensive prohibitions." This phrase describes what is ordinarily a brief statutory clause comprehensively forbidding commercial or industrial work or labor on Sunday, ordinarily excepting "works of necessity and charity." An example is section 5 of Massachusetts General Laws, chapter 136, set forth in Appendix A to this brief. The fifth column states the presence or absence of "specific prohibitions" in the particular state. Examples are section 13 of Massachusetts General Laws, chapter 136, Appendix A, prohibiting the service of civil process on the "Lord's Day"; section 17 of chapter 136, prohibiting certain hunting and fishing activities on that day; and section 18 of the same statute, prohibiting on that day the keeping by innholders of gaming devices for amusement on that day.

The sixth column shows whether in the State or other jurisdiction there is a "Sabbatarian Exemption." A typical example occurs in the first clause of the 5th paragraph of section 6 of Massachusetts General Laws, chapter 136, set forth in Appendix A, which provides in substance that the comprehensive prohibition of section 5 shall not "prohibit the performing of secular business and labor on the 'Lord's Day' by any person who conscientiously believes that the 7th day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; . . ." The seventh column states the presence or absence of essential and recreational exceptions. A series of such exceptions is found in section 6 of chapter 136, of Massachusetts General Laws, including the distribution of steam, gas or electricity, the distribution of water, the use of telegraph and telephone, the sale of drugs and medi-

cines and medical equipment. The statutes of many States expressly provide for permission to sell certain essential commodities for household use, characteristically ice, milk and bread. Recreational exceptions to the comprehensive Sunday closing laws include many types of recreational activity which in the judgment of the State Legislature have been thought to add to the opportunity of the people of the State to use Sunday for pleasant outings or for other family diversions. Thus in section 6 of chapter 136 of Massachusetts General Laws live bait may be sold to permit recreational fishing; gasoline and oil and accessories may be sold for the use of motor cars and motor boats on Sunday; clams may be dug; catalogues of pictures and other works of art may be sold to those who visit exhibits. Under section 21 of chapter 136 of Massachusetts General Laws public baseball, hockey and basketball are lawful if permitted by vote of the city or town authorities. So under section 4A of chapter 136 of Massachusetts General Laws local authorities may authorize various amusement at parks, beaches or resorts on "the Lord's Day."

The eighth column undertakes to give the important older, and recent adjudications upholding, or finding invalid, Sunday closing laws or other Sunday legislation; the ground of the objection, particularly whether based on the Federal or the State Constitutions; and, where it is particularly significant, the nature of the procedure. In cases where a person observed Saturday as a Sabbath and claimed exemption from the Sunday laws on that ground, although not so allowed by statute or otherwise, this has been indicated in the column of adjudications.

A summary of the number of States in which adjudications occur upholding Sunday legislation, and a summary of the adjudications, where they occur, finding Sunday leg-

islation invalid, with a classification of the grounds of so holding, occurs in point VI-d of this brief, pages 65 to 76.

For the convenience of the Court, a list of recent Law Review commentaries on Sunday closing legislation and adjudication is here appended.

RECENT LAW REVIEW NOTES ON SUNDAY CLOSING STATUTES.

"Sunday Statutes in a Modern Community," 61 Yale Law Journal, 427 (March, 1952).

"Sunday Closing Laws; Police Power Restrictions on Business," 4 St. Louis University Law Journal, 365 (Fall, 1957).

"Sunday Blue Laws: An Analysis of Their Position in our Society," 12 Rutgers Law Review, 505 (Spring, 1958).

"General Survey of the Sunday and Holidays Laws in New England," 39 Boston University Law Review, 543 (Fall, 1959).

"State Sunday Laws and the Religious Guarantees of the Federal Constitution," 73 Harvard Law Review, 729 (February, 1960).

"New Trend in Civil Rights Litigation? Sunday Laws, Released Time, and Bible Reading in the Public Schools as Affected by the First Amendment," 28 George Washington Law Review, 579 (March, 1960).

"Sunday Blue Laws: A New Battle on an Old Front," 11 Syracuse Law Review, 254 (Spring, 1960).

STATE SUNDAY CLOSING LEGISLATION AND ADJUDICATION TABULATED

APPENDIX B—*Continued.*

STATE SUNDAY CLOSING LEGISLATION AND ADJUDICATION TABULATED.

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exemptions	Essential and recreational exceptions	
Alabama	Ala. Code, Title 14, §§ 420 to 422 (1955 Supp.)	Const. of 1901, Art. I, § 3	yes	yes	no	yes	*Lane* v. *McFayden*, 259 Ala. 205, 66 So. 2d 83 (1953). *Reynolds* v. *McFayden*, 259 Ala. 235, 66 So. 2d 89 (1953). "Police power" upholds statute. No violation of religious liberty or equal protection, Federal or State. *Frolickstein* v. *Mobile*, 40 Ala. 725 (1867), Sunday closing law applied to sabbatarian Saturday-closing Jewish merchant held not violative of State Constitutional freedom of religion clause.
Alaska	Alaska Comp. Laws, § 1-1-6 (1949).	Const. of 1957, Art. I, § 4	no	no	no	no	*In re Dalton*, 8 Alaska 338 (1937). Fine paid on Sunday not ordered refunded. Validity of Alaska statute closing courts on Sunday not passed on.
Arizona	Ariz. Rev. Stat. Ann. § 32-357 (1956)	Const. of 1912, Art. II, § 12, Art. XX, § 1	no	yes	no	no	*Elliott* v. *State*, 29 Ariz. 389, 242 P. 340 (1926). Town ordinance invalidated under State Constitution as making unjustified classification. General power to enact Sunday closing statutes stated *obiter*.

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
Arkansas	Ark. Stat. Ann. §§ 84 to 2828 (repld. 1960)	Const. of 1874, Art. II, §§ 24, 25, 26	repealed 1953	yes	yes	yes	*Scoles* v. *State*, 47 Ark. 476, 1 S.W. 769 (1886). Sunday closing statute not unconstitutional (Federal or State Constitution not specified) as applied to Saturday-sabbatarian Seventh Day Adventist. *Taylor* v. *Pine Bluff*, 226 Ark. 309, 289 S.W. 2d 679 (1956); cert. den. 352 U.S. 894 (1956). XIVth Amendment not violated by statute so enforced as to close grocery stores on Sunday but leave other stores open. Followed in *Hickinbotham* v. *Williams*, 227 Ark. 126, 292 S.W. 2d 897 (1956).
California	Cal. Code Ann., Gov. § 6700 (1959)	Const. of 1849, Art. I, § 4	repealed 1925	no	no	no	*Ex parte Newman*, 9 Calif. 502 (1858). Sunday-closing law invalid under religious freedom clause and clause resembling Federal due process clause, both in State Constitution, as applied to a Jewish merchant. *Ex parte Andrews*, 18 Calif. 678 (1861). Sunday Act of 1861 upheld on State Constitution challenge. Dissenting opinion in *Newman* stated as now prevailing law. *Soon Hing* v. *Crowley*, 113 U.S. 703 (1885). Affirms a denial of habeas corpus to one convicted of night work in violation of San Francisco ordinance. Dictum, widely quoted and followed, upholds Sunday closing laws as labor

							Affirms a denial of habeas corpus to one convicted of night work in violation of San Francisco ordinance. Dictum, widely quoted and followed, upholds Sunday closing laws as labor regulation. *Deese* v. *City of Lodi*, 21 Calif. App. 2d 631, 69 P. 2d 1005 (1937). City ordinance closing grocery but allowing cigar, etc., stores open is invalid under equal-privileges clause of State Constitution and *semble* XIVth Amendment due process and equal protection clauses.
Colorado	Colo. Rev. Stat. § 40-8-14; § 27-1-4(5) (1953)	Const. of 1876, Art. II, § 4	yes	yes	no	no	*Mosko* v. *Dunbar*, 135 Colo. 172, 309 P. 2d 581 (1957). Statute forbidding Sunday automobile sales does not offend XIVth Amendment, even though farm tractors, etc. excepted. *City of Denver* v. *Bach*, 26 Colo. 530, 58 P. 1089 (1899). City ordinance closing clothing and other enumerated stores invalid under State Constitution as "class legislation." *McClelland* v. *City of Denver*, 36 Colo. 486, 86 P. 126 (1906). Sunday closing ordinance covering barber shops not invalid on "constitutional" (State or Federal, or both, not clearly stated) grounds, as "class legislation."
Connecticut	Conn. Rev. Stat. §§ 53-301 to -303 (1958). § 53-300 (Supp. 1959)	Const. of 1955, Art. I, §§ 3, 4	yes	yes	yes	yes	*State* v. *Hurliman*, 143 Conn. 502, 123 A. 2d 195 (1956). Conviction of delicatessen proprietor who sold liverwurst in violation of Sunday closing statute not convicted in violation of equal protection clauses in State and Federal Constitutions; defendant's argument was that the statute excepted sales of milk, tobacco, bakery products, etc. *State* v. *Shuster*, 145 Conn. 554, 145 A. 2d 196 (1958). *Hurliman* case followed; furniture dealer unsuccessfully defended Sunday-law

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							prosecution by pointing out that the statute excepted antique dealers, and contending that this denied equal protection guaranteed by State and Federal Constitutions.
Delaware	Del. Code Ann., §§ 906 & 152	Const. of 1879, Art. I, § 1 (1953)	no	yes	no	no	None
District of Columbia	Dist. Col. Code, §§. 25 to 107 (1951)	United States Const. of 1787, Amdts. I, XIV	no	yes	no	no	*In District of Columbia* v. *Robinson*, 30 App. D.C. 282 (1908), an information for Sunday work in violation of a Maryland Act of 1723 was held properly dismissed. The Act was obsolete and repealed by implication. *Siddons* v. *Edmondston*, 42 App. D.C. 459 (1914). Police regulations of District of Columbia which forbade public shows, etc., on Sunday upheld as applied to baseball. Not invalidated by any policy analogous to XIVth Amendment.
Florida	Fla. Stat. Ann., §§ 855.01 to .05 (1955), and Fla. Laws of 1959, c. 59-295	Const. of 1885, Declaration of Rights, §§ 5, 6	held unconstitutional	yes	no	yes	*Gilooley* v. *Vaughn*, 92 Fla. 943, 110 So. 653 (1926). Sunday movie-closing city ordinance not invalidated by State Constitution's due process clause. *Kelly* v. *Blackburn*, 95 So. 2d 260 (Fla. Supr. Ct. 1957). General Sunday closing laws applied here to a used-car dealer; held unconstitutional (State or Federal Constitution not clear) on ground of unjustifiable exceptions. Florida Laws, 1959, c. 59-295, is a corrective measure reciting distinctive reasons for Sunday closing of car-sellers.
Georgia	Ga. Code Ann. §§ 26-6901 to -6920 (1953)	Const. of 1945, Art. I, §§ 2-112, 2-113, 2-114	yes	yes	no	yes	*Hennington* v. *Georgia*, 163 U.S. 299 (1896). A Georgia law forbidding Sunday freight-trains held not invalid as in conflict with the Federal commerce clause, though applied to a freight-train on an interstate journey. "It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty." *ibid.* p. 304.
Hawaii	Hawaii Rev. Laws, §§ 144-33, 155-19 (1955)	Const. of 1950, Art. I, § 3	no	yes	no	yes	None

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exemptions	Essential and recreational exceptions	
Idaho	Idaho Code, §§ 18 to 6203 (1948, Cum. Supp. 1959)	Const. of 1890, Art. I, § 4 Art. IX, §§ 5, 6 Art. XX, § 19	no	yes	no	yes	*State* v. *Dolan*, 13 Idaho 693, 92 P. 995 (1907). Neither State Constitution nor XIVth Amendment contravened by compulsory Sunday closing law, as applied to a grocer, despite specific exemptions for restaurants, livery-stables, for sales of sickroom supplies, candy, cigars, etc. *State* v. *Cranston*, 59 Idaho 561, 85 P. 2d 682 (1938). *Dolan* is followed and approved on similar facts despite an argument that "times and conditions have changed."
Illinois	Ill. Stat. Ann. c. 38, § 549 (1939)	Const. of 1870, Art. II, § 3; Art. VII, § 3; Art. IX, § 3	no	yes	yes	no	*City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E. 2d 52 (1938). City ordinance contained comprehensive Sunday closing requirements with specific exemptions for restaurants, drug-stores, tobacco-stores etc. Julian convicted of running a grocery on Sunday. Supreme Court of Illinois reversed conviction. "We do not see where the public welfare is served by closing the grocery store and allowing a confectionery store to remain open, nor in closing a notions store while a drug store next door which sells notions is permitted to operate. . . . Liberty, as that term is used in the constitution . . .
							[State or Federal not specified] unduly re-

as that term is used in the constitution . . .

[State or Federal not specified] unduly restricted."

Humphrey Chevrolet Inc. v. *City of Evanston*, 7 Ill. 2d 402, 131 N.E. 2d 70 (1956). Automobile dealers sought to enjoin, as applicable to them, a comprehensive Sunday closing city ordinance with specific commodities exempted. *Mt. Vernon* distinguished on ground there grocery store required to close while tobacco or confectionery store selling some of same commodities permitted to be open. But no sales of automobiles by any one permitted. Relevanec to State or Federal Constitution not stated. As to violation of religious freedom of State Constitution: "The plaintiffs, most of whom are corpofations, have not alleged that they are members of any religious groups that would be affected by this, and therefore they have no standing to raise the objection." Decree dismissing complaint affirmed.

Pacesetter Homes, Inc., v. *Village of South Holland; Cisek* v. *Same*, 18 Ill. 2d 247, 163 N.E., 2d 464 (1960). Cisek and others who run motel, restaurant and gas-station and two residents who wish to use these accommodations or buy goods obtained declaratory judgment holding a comprehensive Sunday closing ordinance with specific exceptions "unconstitutional" "insofar as it prohibits the business of the plaintiffs." Pacesetter Homes, Inc., sought a declaration of unconstitutionality insofar as ordinance prevented exhibiting houses on Sunday; was

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							denied relief sought. On appeals, the Supreme Court of Illinois refused to consider effect of the ordinance on any individual, but held the ordinance "unconstitutional" (State or Federal not specified) on the stated ground that "since harmless as well as harmful businesses are prohibited the ordinance is arbitrary and cannot be sustained."
Indiana	Burn's Ind. Stat. Ann., §§ 10-4301 to -4305 (1956)	Const. of 1851, Art. I, §§ 2 to 6	yes	yes	yes	yes	*Armstrong* v. *State*, 170 Ind. 188, 84 N.E. 3 (1908). Specific Sunday closing law applicable to barbers violates constitutional clause requiring "a general law" where practicable. *Tinder* v. *Clarke Auto Co.*, 238 Ind. 302, 149 N.E. 2d 808 (1956). Indiana statute fined automobile dealers more than other dealers who violate Sunday closing laws. Dealer obtained injunction below, here vacated. Need for free day for family, severally employed, to enjoy together, stated. Special conditions of automobile business justify special treatment; State Constitution as to "general laws", not validated.
Iowa	Iowa Code	Const. of	yes	yes	no	no	

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exemptions	Essential and recreational exceptions	
							tional. No showing of situation like *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Theaters should be left to assert any defenses they may have in State courts, subject to review in Superior Court of the United States. Meantime, Federal Courts should not give equitable relief and theater should obey statute.
Kentucky	Ky. Rev. Stat., § 436.160 (1956)	Const. of 1956, Bill of Rights, §§ 1, 5	yes	yes	yes	yes	*Capital Theatre Co.* v. *Commonwealth*, 178 Ky. 780, 199 S.W. 1076 (1918). Conviction for running Sunday movie in violation of comprehensive Sunday closing statute here affirmed. Unsuccessful defense seems based on "necessity" of movie. *Strand Amusement Co.* v. *Commonwealth*, 241 Ky. 48, 43 S.W. 2d 321 (1931). Conviction below for running Sunday movie here reversed because indictment charged several offenses and prosecutor should have elected one. Constitutionality (State or Federal not specified) of statute stated. *City of Harlan* v. *Scott*, 290 Ky. 585, 162 S.W. 2d 8 (1942). City ordinance forbidding Sunday movies here held invalid as conflicting with policy of State statute permitting them. General

Iowa	Iowa Code Ann., § 124.20 (1946)	Const. of 1857, Art. I, §§ 3, 4	repealed 1955	yes	no	no	*State of Iowa* v. *Linsing*, 178 Iowa 484, 159 N.W. 905 (1916). Barber fined below for violation of comprehensive Sunday closing statute. Here affirmed; statute held "constitutional"; whether State or Federal not specified; apparent contention was unjustified classification.
Kansas	Kan. Gen. Stat. Ann., §§ 21-952 to 956 (1949)	Const. of 1859, Bill of Rights, § 7; Art. VI, § 8; Art. XII, § 3	yes	yes	yes	yes	*State of Kansas* v. *Blair*, 130 Kan. 863, 288 P. 729 (1930). Blair convicted below of violating comprehensive Sunday closing statutes by running a movie theater. Here affirmed despite argument based on religious freedom guaranties of State Constitution and of Federal I Amendment. *State* v. *Haining*, 131 Kan. 853, 293 P. 952 (1930). Haining, conceded by State to be a "bona fide Seventh Day Adventist" who observed Saturday as a sabbath, was convicted below of violating a comprehensive Sunday closing statute by running a Sunday movie. Here affirmed despite defendant's contention of unconstitutionality under unspecified provision of Federal Constitution and religious freedom provisions of State Constitution. *Boynton* v. *Fox West Coast Theatres Corp.*, 607 F. 2d 851 (C.C.A. 10, 1932). Theater Corporat. brought suit in United States District Court to enjoin both prosecution and quo warranto, based on Sunday movie operation. Interlocutory injunction granted by District Court on appeal, despite theaters' argument based on Federal commerce clause and on alleged discriminatory enforcement violating XIVth Amendment held reversed and bill dismissed. Statute constitu-

movies here held invalid as conflicting with pol-

							icy of State statute permitting them. General constitutionality of Sunday laws stated.
Louisiana	La. Rev. Stat. Title 57, §§ 191, 193 (1950)	Const. of 1921, Art. I, § 4; Art XIV, § 15 (A) (1)	yes	yes	held unconstitutional	yes	*City of Shreveport* v. *Levy*, 26 La. Ann. 671, 21 Am. Rep. 553 (1874). Defendant convicted below for violating a Sunday closing city ordinance. Here reversed. The ordinance contained an exception in favor of Saturday sabbatarians; ". . . the ordinance of a City Council which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void." (Federal or State not specified.) *State ex rel. Walker-Merz* v. *Judge*, 39 La. Ann. 132, 1 So. 437 (1886). Held, Walker-Merz not entitled to enjoin judge and District Attorney from prosecuting under Sunday closing statute, on contention that statute conflicts with State Constitution and XIVth Amendment. Statute conflicts with neither: "it . . . is to be judged precisely as if it had selected for the day of rest any day of the week other than Sunday; . . ." *State* v. *Trahan*, 214 La. 100, 36 So. 2d 652 (1948). A Louisiana statute forbade Sunday business, but among exceptions specified hotels, boarding houses and restaurants; the statute allowed hotels and boarding houses to sell wine for table use on Sunday but withheld such permission from restaurants. Trahan was prosecuted and convicted below for serving wine on Sunday in his restaurant. He appealed to the Supreme Court of Louisiana, which, after a rehearing, upheld the statute despite State constitutional and XIVth Amendment challenges

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exceptions	Exemptions and exceptions: Essential and recreational exemptions	Adjudications
							of the classification. ". . . valid ground for the exemption is always presumed to exist in the absence of a showing that no reasonable state of facts can be conceived to justify it. *Metropolitan Gas Co.* v. *Brownell*, 294 U.S. 580 and cases cited."
Maine	Maine Rev. Stat. Am., c. 134, §§ 38 to 45 (1954) c. 134, § 38A (1959)	Const. of 1834, Art. I, § 3	yes	yes	yes	yes	None
Maryland	Md. Code Ann., Art. 27, §§ 492 to 524 (1957)	Const. of 1867, Arts. XXXVI, XXXVIII	yes	yes	no	yes	*Judefind* v. *State of Maryland*, 78 Md. 510, 28 A. 405 (1894). Judefind, convicted below for husking corn on Sunday in violation of statute, brings error on ground of violation of XIVth Amendment and State Constitution. Held, writ of error quashed for procedural reasons *Obiter*, no violation of State or Federal Constitutions. Failure to provide compulsory rest for non-Sunday sabbatarians on their sabbath not an interference with their religious liberty. *McGowan* v. *State of Maryland*, 220 Md. 117, 151 A. 2d 156 (1959). Conviction for opening store in violation of comprehensive statutory prohibition of Sunday merchandising with specified exceptions, here affirmed. No violation of Ist and XIVth Amendments. Appeal pending in Supreme Court of United States.
Massachusetts	Mass. Gen. Laws c. 136, §§ 5, 6 (1958)	Const. of 1780, Declaration of Rights. Arts. II, III	yes	yes	yes	yes	*Commonwealth* v. *Has*, 122 Mass. 40 (1877). Conviction of Saturday sabbatarian, who observed that day, for keeping his shop open on Sunday, affirmed. State equality of religion constitutional clause no defense. *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N.E. 2d 920 (1957). Conviction of Saturday sabbatarian who observed that day for keeping supermarket open on Sunday at prohibited hours affirmed. Rights to religious liberty and equality under State Constitution not infringed. *Crown Kosher Super Market of Mass., Inc.*, v. *Gallagher*, 176 F. Supp. 466 (D.C. D. Mass. 1959). General Sunday closing statute with specific exceptions held unconstitutional under XIVth Amendment as applied to plaintiffs insofar as it requires Sunday closing of Market. Appeal pending in Supreme Court of United States. Case discussed in this brief, *passim*.

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
Michigan	Mich. Stat. Ann. § 18.851 to .852, 18.855 (1957)	Const. of 1908, Art. II, §§ 3, 17, Art. XI, § 1	yes	yes	yes	yes	*Re Berman*, 344 Mich. 598, 75 N.W. 2d 8 (1956). Berman, Saturday sabbath observer as to one of his three stores convicted of keeping his furniture store open on Sunday in violation of Detroit ordinance. He sought state certiorari to review conviction; writ dismissed below; here affirmed. Berman's activities do not fall within sabbatarian exemption of ordinance. Ordinance "a valid exercise of the police power"; no constitutional point specified.
Minnesota	Minn. Stat. Ann., § 614.29 (1945); § 168.275 (1957)	Const. of 1857, Art. I, §§ 16, 17	yes	yes	no	yes	*Petit* v. *Minnesota*, 177 U.S. 164 (1900). Petit, a barber, was convicted under a Minnesota Sunday closing statute which singled out barbering as not work of charity or necessity. Here, on error to Supreme Court of Minnesota, conviction affirmed. The unanimous United States Supreme Court found no Federal constitutional error in the statutory classification. *State ex rel. Hoffman* v. *Justus*, 91 Minn. 447, 98 N.W. 325 (1904). Conviction for selling groceries on Sunday here affirmed. Challenge of classification under State Constitution here rejected in reliance on *Petit*. *State* v. *Dean*, 149 Minn. 419, 184 N.W. 275 (1921). Conviction for [illegible]

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exceptions	Essential and recreational exemptions	
							sales. Injunction denied below. On appeal the judgment was reversed. The ordinance was held in conflict with a State constitutional provision forbidding "a local or special law . . . where a general law can be made applicable . . ." *ABC Liquidators, Inc.*, v. *Kansas City*, 322 S.W. 2d 876 (Supr. Ct. Mo. 1959). Plaintiffs, auctioneers, brought suit to enjoin enforcement of a city ordinance forbidding Sunday auctions. Injunction granted below; City appealed. Here reversed and petition dismissed. The ordinance violates neither State nor Federal equal protection clause.
Montana	Mont. Rev. Code, §§ 94-3511, 94-35 to -216 (1947)	Const. of 1889, Art. III, § 4, Ordinance No. 1	no	yes	no	yes	*State* v. *Loomis*, 75 Mont. 88, 242 P. 344 (1926). A Montana statute forbade Sunday dance-hall operation. Loomis, convicted below of violation, here appeals, contending that the classification is invalid under the XIVth Amendment. Held, judgments affirmed; ". . . " will be presumed that the classification is reasonable and the defendant must assume the burden of showing that there is not any admissible hypothesis upon which it can be justified . . .", 75 Mont. 93.
Nebraska	Neb. Rev.	Const. of	no	yes	yes	yes	*Stewart Motor Co.* v. *City of Omaha*, 190 Neb.

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
Nevada	Nev. Rev. Stat., § 201.260 (1957)	Const. of 1864, Art. I, § 4	no	yes	no	no	None
New Hampshire	N.H. Rev. Stat. Ann. §§ 578.3 to -.5 (1955)	Const. of 1784, Art. I, § 5	yes	yes	no	yes	None
New Jersey	N.J. Stat. Ann., § 2A; 171-1 (1953) § 2A; 171-1.1 (1955)	Const. of 1947, Art. I, §§ 3, 4, 5; Art. IV, § 792	yes	yes	yes	yes	*Gundaker Central Motors, Inc.*, v. *Gassert; Haber* v. *Gassert*, 23 N.J. 71, 127 A. 2d 56 (1956). Gundaker and Haber were motor dealers. Gundaker did his biggest day's business of the week on Sunday. By suit he attacked the constitutionality of a New Jersey statute forbidding Sunday car dealing. Haber's complaint was substantially similar but also attacked an additional provision for revoking or suspending a dealer's license on conviction. The trial court gave judgments of unconstitutionality in both cases, on the ground of unreasonable classification under "the federal and our State Constitutions." On appeal the Supreme Court of New Jersey found that there was a rational basis for treatment of the automobile business differently from other businesses, unanimously reversed the

							of classification under State Constitution here rejected in reliance on *Petit*. *State* v. *Dean*, 149 Minn. 410, 184 N.W. 27 (1921). Conviction for conducting business of portrait photography here affirmed. Statute held within State's "police power"; nature of constitutional challenge, if any, not specified. *Power* v. *Nordstrom*, 150 Minn. 228, 184 N.W. 967 (1921). Village ordinance forbidding Sunday movies upheld in attempted injunction suit. No constitutional ground specified.
Mississippi	Miss. Code Ann., §§ 2368, 2369 (1956)	Const. of 1890, Art. III, § 18; Art. X, § 25; Art. VIII, § 208	yes	yes	no	yes	*Paramount-Richards Theatres, Inc.*, v. *City of Hattiesburg*, 210 Miss. 271, 49 So. 2d 574 (1950). City obtained an injunction below against theater showing movies after 6 p.m. on Sundays. Here affirmed. No Federal or State constitutional infirmity in statute or in its administration.
Missouri	Mo. Stat. Ann.; § 563.690 to -.700 (1953)	Const. of 1945, Art. I, §§ 5, 6, 7	yes	yes	yes	yes	*Komen* v. *City of St. Louis*, 316 Mo. 9, 289 S.W. 838 (1927). Komen brought suit to enjoin prosecution of a St. Louis, Missouri, city ordinance forbidding sales in bakeshops after 9 a.m. on Sunday. Komen and his customers were Orthodox Jews; his goods were Kosher; he and his customers observed the Saturday sabbath. Komen contended that the ordinance discriminated against them and violated their religious freedom, in conflict with Federal XIVth Amendment and State Constitution. Here denial of permanent injunction in lower court affirmed. *McKaig* v. *Kansas City, Missouri*, 363 Mo. 1033, 256 S.W. 2d 815 (1953). McKaig, a motor-car dealer, brought suit to enjoin enforcement of a city ordinance forbidding Sunday automobile

Nebraska	Neb. Rev. Stat., § 28-938 to -940 (1956)	Const. of 1875, Art. I, § 4	no	yes	yes	yes	*Stewart Motor Co.* v. *City of Omaha*, 120 Neb. 776, 235 N.W. 332 (1931). A city ordinance of Omaha forbade Sunday motor sales. Stewart Company brought suit to enjoin enforcement, contending that it was "class legislation" and discriminatory, violating State Constitution and XIVth Amendment. Below injunction denied. Here affirmed. Ordinance conflicts with neither State nor Federal Constitution. *Arrigo* v. *City of Lincoln, Nebraska*, 154 Neb. 537, 48 N.W. 2d 643 (1951). A Lincoln city ordinance forbade grocery stores and meat markets to open for business on Sunday, but permitted drugstores, ice-cream parlors, fruit stores and certain other vendors who might operate "for necessary purposes" to sell fresh fruits, ice, bread and milk on Sundays. Arrigo and others maintained groceries and markets; they sued to enjoin enforcement, contending classification arbitrary and invalid under State and Federal Constitutions. (Specific constitutional clauses not stated.) The trial court dismissed the petition. On appeal, reversed. "It is not contemplated that there shall be on Sunday business as usual. Places of business activity excepted by the proviso of the ordinance and appellants may have their places of business open on Sunday only 'for necessary purposes' and for the sale of fresh fruits, ice, bread and milk . . ." Whether court relied on State or Federal Constitution is not clear.

State	Citation to Sunday statute	State constitutional provision religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							count department stores for injunction a comprehensive Sunday closing ordinance of Paramus, with specific exceptions, held not unconstitutional (State or Federal not specified), either on ground of unreasonable classification, or of unequal geographical application within State.
New Mexico	N.M. Stat. Ann., §§ 40-44-2, 40-44-3 (1953)	Const. of 1911, Art. II, §§ 11, 5; Art. VII, § 3	yes	yes	no	yes	None
New York	N.Y. Consol. Laws Ann., §§ 2143, 2144 (1944)	Const. of 1938, Art. I, § 3	yes	yes	yes	yes	*People* v. *Havnor*, 149 N.Y. 195, 43 N.E. 541 (1896). A New York statute forbade barbering on Sunday, except that in New York City and in Saratoga Springs it could be carried on until 1 p.m. Havnor was convicted of barbering in New York City after 1 o'clock on Sunday. The Court of Appeals affirmed the conviction despite defendant's arguments under State due process and XIVth Amendment equal protection clause. Writ of error dismissed on procedural grounds. 170 U.S. 408 (1898).

Silverberg Brothers v. *Douglas*, 62 Misc. 340,

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							mously by the New York Court of Appeals with a *per curiam* opinion. Both defendants then appealed to the United States Supreme Court, which dismissed the appeal on motion for want of a substantial Federal question, 341 U.S. 907 (1951). Both in the New York Court of Appeals and in the United States Supreme Court. Friedman and Praska contended that the statute in question unconstitutionally established a religion contrary to XIVth and Ist Amendments; unconstitutionally denied to Friedman and Praska their Federal Constitutional freedom of religion rights because of their Saturday sabbatarian observance; and denied them due process and equal protection under XIVth Amendment because of the classification in the statute. The defendants also argued discriminatory application of the statute to them. (Statement compiled from New York and United States Supreme Court records and briefs.)
North Carolina	N.C. Gen. Stat., § 103-2 to 103-5 (1958)	Const. of 1876, Art. I, § 26	repealed 1951	yes	no	yes	*State* v. *McGee*, 237 N.C. 633, 75 S.E. 2d 783 (1953). The City Code of Charlotte, North Carolina, forbade public shows on Sunday, permitting movies, however, except 1.30 to 6.30 p.m. and after 9 p.m. McGee, convicted of a violation by running a drive-in movie between 6.30 and 9, appealed to the Supreme Court of North Carolina, arguing unreasonable classification under XIVth Amendment; and religious objections under Federal I Amendment. The North Carolina Supreme Court affirmed the conviction. McGee appealed to the Supreme Court of the United States, which dismissed for want of a substantial Federal question, 346 U.S. 802 (1953). *State* v. *Towery*, 239 N.C. 274, 79 S.E. 2d 513 (1954). Towery was convicted of violating the City Code of High Point, North Carolina, by running a "curb-market" on Sunday. He appealed to the Supreme Court of North Carolina, arguing that specific exceptions in the ordinance made it "unconstitutional" (State or Federal not specified) as to him, because of unreasonable classification. The Supreme Court of North Carolina affirmed. Towery appealed to the United States Supreme Court, which dismissed for want of a substantial Federal question. 347 U.S. 925 (1954).

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exemptions	Essential and recreational exceptions	
North Dakota	N.D. Rev. Code, §§ 12-2115 to 12-2122 (1943) (1957 Supp.)	Const. of 1889, Art. I, § 4	yes	yes	yes	yes	*State* v. *Diamond*, 56 N.D. 854, 219 N.W. 831 (1928): Comprehensive Sunday closing statute for stores, with usual specific exceptions for drugs, milk, etc., and permitting fish and meat to be sold before 10 a.m. did not deny to a grocer equal protection as guaranteed by XIVth Amendment.
Ohio	Ohio Rev. Code Ann., §§ 3773.23 to 3773.99; 4709.24; 4301.22 (1953), § 3773.24 (1959 Amdt.)	Const. of 1851, Art. I, § 7	yes	yes	yes	yes	*State* v. *Ullner; State* v. *Kidd*, 167 Ohio St. 521, 150 N.E. 2d 413 (1958). Storekeepers and a clerk were convicted below for violating Ohio Sunday closing law. Convictions here affirmed despite constitutional arguments of religious discrimination and unreasonable classification. (Argued under both State and Federal Constitutions; see reference in *Ullner* below, 105 Ohio App. 546, 3, 143 N.E. 2d 849, 851 (Ohio Ct. App. 1957); to the XIVth Amendment.) Appeals dismissed for want of a substantial Federal question. *Ullner* v. *Ohio*, 358 U.S. 131 (1958), *Kidd* v. *Ohio*, 358 U.S. 132 (1958).
Oklahoma	Okla. Stat. Ann., 21 §§ 907 to 912, 29; § 228 (1951)	Const. of 1907, Art. I, § 2	yes	yes	yes	yes	*Ex parte Hodges*, 65 Okla. Crim. R. 69, 83 P. 2d 201 (1938). The City of Shawnee had an ordinance forbidding places of business to open on Sunday, with the usual exceptions for drugstores, ice-cream parlors, fruit stands, etc. A convicted grocer is here discharged by the Oklahoma Criminal Court of Appeals on habeas corpus because the ordinance conflicted with a clause in the State Constitution "prohibiting special laws where a general law can be made applicable," and is inconsistent with State statutes. *Obiter* statement upholds Sunday laws generally. *Ex parte Johnson*, 77 Okla. Crim. R. 360, 141 P. 2d 599 (1943). Violator of city ordinance prohibiting Sunday barbering denied release on habeas corpus. He contended unsuccessfully, among other arguments, that the ordinance denied him due process and equal protection under the Federal Constitution. *Ex parte Pappe*, 88 Okla. Crim. R. 166, 201 P. 2d 260 (1948). Pappe, convicted of violating a city ordinance forbidding Sunday beer sales, here released on habeas corpus. Ordinance conflicts with a State beer statute. General validity of Sunday laws stated *obiter*.

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Oregon	Ore. Rev. Stat., §§ 690.990, 726.990, 462.120, 463.030 (1953)	Const. of 1859, Art. I, §§ 2-6	no	yes	no	no	*Ex parte Northrup*, 41 Ore. 489, 69 P. 445 (1902). An Oregon statute made Sunday barbering a misdemeanor. Northrup, in custody on charge of violation sought habeas corpus on ground of State unconstitutionality as "special legislation" and Federal unconstitutionality under the XIVth Amendment due process clause. Release denied below; here affirmed. Statute valid under both State and Federal Constitutions. *Chang Sing* v. *Astoria*, 79 Ore. 411, 155 P. 378 (1916). A city ordinance of Astoria forbade stores to stay open after 6 p.m. on week days except Saturdays, when 9 was the closing hour; all were required to close on Sunday. The week preceding Christmas was an exception. Plaintiffs brought suit to enjoin enforcement, pointing out the specific exceptions such as drugstores, cigar stores, fruit and confectionery stores, millinery stores, furniture stores and others. Ordinance held invalid under State constitutional provision requiring that no law grant any citizen privileges or immunities which on the same terms do not belong to all citizens.

tutions." On appeal the Supreme Court of New Jersey found that there was a rational basis for

treatment of the automobile business differently from other businesses, unanimously reversed the judgments below and dismissed the complaints. Gundaker appealed to the Supreme Court of the United States, which "dismissed for want of a substantial federal question." 354 U.S. 933 (1957).

Sarner v. *Union Township*, 55 N.J. Super. 523, 151 A. 2d 208 (1959). Retail merchant plaintiffs obtained a declaratory judgment that a Sunday closing law excepting three counties unreasonably discriminated semble under the XIVth Amendment and the New Jersey Constitution.

Two Guys from Harrison, Inc., v. *Furman*, 160 A. 2d 265 (Sup. Ct. N.J. 1960). After Sarner was decided the New Jersey Legislature adopted a new Sunday closing law to be operative in such of the States' twenty-one counties as might adopt it upon referendum. Twelve counties adopted it. The present plaintiffs brought suit to have the statute declared unconstitutional as a union of State and Church, forbidden by Ist and XIVth Amendments, and by State Constitution and unconstitutional for unreasonable classification under Federal XIVth Amendment and a somewhat comparable State constitutional clause. Trial court dismissed complaint; plaintiffs appealed. Here held proper to deny plaintiffs' motion for summary judgment; but case remanded to trial court to try issue of equal protection.

Masters-Jersey, Inc., v. *Mayor of Poramus*, 160 A. 2d 841 (Sup. Ct. N.J. 1960). In suit by dis-

Silverberg Brothers v. *Douglas*, 62 Misc. 340, 14 N.Y. Supp. 824. (S. Co. Erie Co. 1909). The Silverbergs were Jewish clothiers who refrained from Saturday business. A New York statute comprehensively forbade Sunday selling, with specific exceptions for tobacco, drugs, milk, ice, etc. The Silverbergs sought an injunction here denied by Cuthbert W. Pound, J., who rejected freedom of religion arguments under State Constitution, and rejected classification arguments (Federal or State not specified), citing *Havnor*. *People* v. *Friedman; People* v. *Praska*, 302 N.Y. 75, 96 N.E. 2d 184 (1950). A New York statute, Penal Law § 2147, comprehensively forbade public selling on Sunday, with specific exceptions for tobacco, bread, milk, eggs, ice, drugs, gasoline, fishing tackle and bait, souvenirs. Food sales were permitted before 10 a.m.; bakeries and delicatessens were also permitted to sell cooked and prepared foods between 4 and 7.30 p.m. Except in cities and villages having a population of 40,000 or more, roadside stands could sell vegetables and farm produce; there were exceptions for caterers and meals to be eaten on premises. But no uncooked flesh foods or fresh or salt meats could be sold at any hour on Sunday. Friedman and Praska were Orthodox Jewish butchers; both refrained, for religious reasons, from all Saturday business. Both sold uncooked meat at retail on Sunday. Both were convicted in the New York Court of Special Sessions; their conviction was affirmed without opinion by unanimous Appellate Division, 276 App. Div. 1008, First Department; and was affirmed unani-

						zen privileges or immunities which on the same terms do not belong to all citizens.
						Brunswick-Balke-Collender Co. v. *Evans*, 228 Fed. 991 (D.C. D. Ore. 1916). A comprehensive Sunday closing statute of Oregon excepted drug-stores, barbers, butchers, bakers and others. Brunswick & Co., sellers of billiard and bowling equipment, sued in three-judge Federal District Court to enjoin enforcement. Beside State grounds, plaintiff contended that the statute conflicted with the XIVth Amendment because of the unreasonable classification. The District Court upheld constitutionality, treating freedom of religion as a question purely under the State Constitution. Brunswick appealed to the Supreme Court of the United States, but on motion of the appellees the case was docketed and dismissed with costs, no one opposing, with other cases "disposed of without consideration by the court." 248 U.S. 587 (1918).
Pennsylvania	Pa. Stat. Ann., 18, § 4699.4 (1945), 18, § 4699.9 (Supp. 1958)	Const. of 1874, Art. I, §§ 3, 4	yes	yes	no	yes	*Specht* v. *Commonwealth*, 8 Pa. St. 312 (1948). Specht was a Seventh Day Baptist, keeping Saturday as a sabbath. He was convicted below of violation of a comprehensive statute prohibiting Sunday work. He brought error in the Supreme Court of Pennsylvania, arguing that his religious freedom, guaranteed by the State Constitution, was violated. Judgment affirmed. *Commonwealth ex rel.* v. *Amer. Baseball Club of Phila.*, 290 Pa. St. 136, 138 A. 497 (1927). Ball club, a Pennsylvania corporation, conducted a game for profit, forbidden by a comprehensive Sunday law. The State Attorney General brought quo warranto on the ground that the corporation had no power to play Sun-

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
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day ball. The court below so held, and enjoined the Club from playing on Sunday. The Club appealed, arguing, beside State grounds, unconstitutional uncertainty under the XIVth Amendment. Affirmed. "We can see no basis whatever for the argument that the act violates the XIV Amdt. to the federal const." 290 Pa. St. 143, 138 A. at 500.

Com. v. *Grochowiak*, 184 Pa. Super. 522, 136 A. 2d 145 (1957). Under a Pennsylvania statute, voters of a township rejected optional Sunday movies. Grochowiak nevertheless showed a film; was convicted under prohibitory terms of statute left in force by rejection of option. He appealed, relying on XIVth Amendment guaranties respecting free expression and discriminatory classification. Conviction affirmed.

Two Guys from Harrison-Allentown, Inc., v. *McGinley*, 179 F. Supp. 944 (D.C. E.D. Pa. 1959). A three-judge District Court refused to enjoin enforcement of the Pennsylvania Sunday closing statutes at the suit of a suburban department store, open every day in the week but doing about a third of its business on Sun-

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Rhode Island	Rhode Island Gen. Laws Ann., § 11-40-1 (1956)	Const. of 1843, Art. I, § 3	yes	yes	yes	yes	None
South Carolina	Code of Laws of S.C., §§ 64-1 to 64-5 (1952) (Supp. 1959)	Const. of 1895, Art. I, § 4	yes	yes	no	yes	*Xepapas* v. *Richardon Chief Constable*, 149 S.C. 52, 146 S.E. 686 (1928). Action to enjoin enforcement of Sunday closing laws applied to "mercantile business." Grounds of complaint, State and Federal unconstitutionality as establishment of religion, prohibition of free exercise, and unreasonaable classification by exempting corporate business. Statute declared unconstitutional on latter ground, citing *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928). Religious objection, including argument as to constraint of Hebrews and Seventh Day Adventists rejected, citing statement by Cooley, Constitutional Limitations (7 ed.), p. 859, that such laws do not impair religious liberty of those who do not observe Sunday as sacred; laws can be upheld as "regulations of police"

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Mullis v. *Celanese Corp.*, 234 S.C. 380, 108 S.E.

							who do not observe Sunday as sacred, may not be upheld as "regulations of police."
							Mullis v. Celanese Corp., 234 S.C. 380, 108 S.E. 2d 547 (1959). Action by employees to compel Sunday off and time-and-a-half for back Sunday work, under State statute, held untenable as statute construed not to apply to this type of plant. Exemption not unconstitutional under XIVth Amendment and equal protection clause.
South Dakota	S. Dak. Code, § 65.04.04 (Supp. 1951)	Const. of 1889, Art. VI, § 3; Art. XXVI, § 18	yes	yes	no	yes	No Sunday law case. Cf., however, *State* v. *Kramer*, 49 S.D. 56, 206 N.W. 468 (1925), in which the State Supreme Court rejected the defendant's contention that as an Orthodox Jew his need for sacramental wine gave him a constitutional right to possess the wine in question. The Court cited *Reynolds* v. *United States*, 98 U.S. 145 (1878).
Tennessee	Tenn. Code Ann. §§ 39-4001 to -4004 (1956)	Const. of 1870, Art. I, §§ 3, 4; Art. VIII, § 3; Art. IX, §§ 1, 2; Art. XI, § 15	yes	yes	no	yes	*Ragio* v. *State*, 86 Tenn. 271, 6 S.W. 401 (1888). Statute forbidding barbers to shave, cut hair or open their bathrooms on Sunday is invalid under State Constitution, as two subjects are included in one Act, and as it grants to some persons privileges not accorded to others. *Re King*, 46 Fed. 905 (C.C. W.D. Tenn. 1891). Seventh Day Adventist who strictly observed Saturday convicted under Tennessee statute for plowing on Sunday. He sought habeas corpus in the Federal court, urging the XIVth Amendment as invalidating the State proceedings. Prisoner remanded. *Kirk v. Olgiati*, 308 S.W. 2d 471 (Sup. Ct. Tenn. 1957). A Chattanooga Sunday closing ordinance not held invalid at the suit of grocers, who contended that, because drugstores, curb markets,

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							filling stations, etc., were excepted and sold some of the same things groceries sell, the classifications were unconstitutional. Whether State or Federal Constitutions or both not specified.
Texas	Texas Penal Code, Arts. 283 to 287 (1952)	Const. of Art. I, §§ 6, 7	yes	yes	yes	yes	*Searcy* v. *State*, 40 Tex. Crim. R. 460, 51 S.W. 1119 (Ct. Cr. App. 1899). Conviction "for selling liquor, being goods, on Sunday. . . ." here affirmed despite "constitutional" argument (State or Federal unspecified) that exemptions of drugstores, etc., makes statute "class legislation." *Ex parte Kennedy*, 42 Tex. Crim. R. 148, 58 S.W. 129 (Ct. Cr. App. 1900). Habeas corpus to test validity of a conviction of Sunday barbering in violation of a statute. Relator remanded to custody. "Sunday laws are almost within the police power of the State. In the language of Mr. Justice Field in *Soon Hing* v. *Crowley*, 113 U.S. 710, 'Sunday laws are upheld not from any right of the government to legislate for the promotion of religious observance, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.'" *Clark* v. *Texas*, 319 S.W. 2d 727 (Ct. Cr. Ap. 1959). Conviction for Sunday opening of store

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							464 (1948): Action by proprietor of market to have adjudged invalid a city Sunday closing ordinance. Ordinance closed stores generally, with the usual exceptions. Demurrer sustained below; here on appeal overruled. "The classification being on a commodity basis, it is arbitrary to permit the sale of a can of orange juice or a can of coffee" (State or Federal Constitution not specified).
Vermont	Vt. Stat. Ann., 13, §§ 3301 to 3308 (1958)	Const. of 1793, c. 1, Art. 3	yes	yes	no	yes	*Jacobs* v. *Clark*, 112 Vt. 484, 28 A. 2d 369 (1942). A contract to keep a gasoline station open for business on Sunday, in violation of a general closing statute, is for that reason unenforceable.
Virginia	Va. Code, Ann., § 18-329 to -354 (1950) (Supp. 1958)	Const. of 1889, Art. I, §§ 16, 58	yes	yes	yes	yes	*Broad-Grace Arcade Corp.* v. *Bright, Mayor*, 48 F. 2d 348 (D.C. E.D. Va. 1931). Corporation sought injunction against interference with its conduct of a miniature golf course on Sunday. Plaintiff relied on XIVth Amendment. A three-judge Federal District Court denied an interlocutory injunction; the court's opinion stated that the provisions of the Sunday closing statute could not be enforced as a religious observance but its aim was to prevent the bad effects of

							department store, open every day in the week
							but doing about a third of its business on Sunday. Now No. 36 on the October, 1960, United States Supreme Court Docket, with probable jurisdiction noted. *Braunfeld* v. *Gibbons*, 28 U.S. Law Week 3310, 3346. The United States District Court, E.D. Pa., upheld the Pennsylvania Sunday closing law in litigation raising the questions of the statute's application to orthodox Hebrews. Questions of religious freedom and unreasonable classification under XIVth Amendment. Probable jurisdiction noted. U.S. S.C. May 23, 1960, No. 67, October, 1960, Docket. *Bargaintown, U.S.A., Inc.*, v. *Whitman*, 28 U.S. Law Week 3334. Appeal by Bargaintown from a decree of the United States District Court, M.D. Pa., upholding Pennsylvania Sunday closing laws against XIVth Amendment. Challenge on both religious and classification grounds. No. 76 on the October, 1960, Appellate Docket, U.S. S.C. No notation of probable jurisdiction at close of preceding term.
Puerto Rico	Laws of Puerto Rico Ann., 33, § 2201 (1956)	Const. of 1952, Art II, § 3	yes	yes	no	yes	*People* v. *Garcia*, 22 P.R. Rep. 759 (1915). Conviction for keeping employees at work after lawful evening hour, affirmed. *Obiter* of Puerto Rico Sunday closing statute; ". . . generally upheld in most of the States on the theory that such regulations are essentially civil and not religious, whose validity is neither strengthened nor weakened by the fact the rest they enjoin is on Sunday."

							and moral debasement which comes from uninterrupted labor.'"
							Clark v. *Texas*, 319 S.W. 2d 727 (Ct. Cr. Ap. 1959). Conviction for Sunday opening of store in violation of Texas statute, affirmed. "We have been presented no argument which would cause us to overrule the prior holdings of this Court in Sayeg v. State, 114 Tex. Cr. R. 153 and the cases there cited, to the effect that the Articles which compromise Chapter Two of Title 7, V.A.P.C. (Sunday Laws) are constitutional."
Utah	Utah Code Ann., § 76-55-1 to -4 and § 11-51 (1953)	Const. of 1895, Art. I, §§ 1, 4; Art. III, §§ 1, 4; Art. X, §§ 12, 13	yes	yes	no	yes	*State* v. *Sopher*, 25 Utah 318, 71 P. 482 (1903). Conviction of Sunday barbering affirmed; statute not "unconstitutional" as denying due process and making an arbitrary classification. (State or Federal Constitution not specified.) Cooley, Constitutional Limitations 734; Field, J., in *Ex parte Newman*, 9 Cal. 518, adopted in *Ex parte Andrews*, 18 Cal. 678; *Specht* v. *Commonwealth*, 8 Pa. 312; *People* v. *Havnor*, 149 N.Y. 195, and other established authorities cited, discussed and relied on, especially to show coincidence of selection of Sunday and religious usage by many people not a ground of unconstitutionality. *Broadbent* v. *Gibson*, 105 Utah 53, 140 P. 2d 939 (1943). Prohibition granted against enforcing Sunday closing statute against proprietors of fruit market. Court states that Sunday closing laws are valid generally, but here the exemptions in favor of tobacco stores, confectionaries, drugstores, etc., render those laws "unreasonably discriminatory and therefore unconstitutional" (State or Federal not specified). *Gronlund* v. *Salt Lake City*, 113 Utah 284, 194 P. 2d

							ute could not be enforced as a religious observance but its aim was to prevent the bad effects of interrupted labor. No unfair enforcement shown as in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Order denying interlocutory motion affirmed per curiam, "but, without prejudice to the power and duty of the District Court, as specially constituted, to inquire and determine whether the court has jurisdiction . . . both in relation to the amount involved in the controversy . . . and with respect to the right of the complainant to maintain this suit in equity . . ." 284 U.S. 588 (1931). *Rich* v. *Commonwealth*, 198 Va. 445, 94 S.E. 2d 549 (1956). Conviction in trial court for violating a Virginia statute by keeping a grocery store open on Sunday. On appeal, reversed because State had failed to prove that what Rich did was not a necessity. Court stated, as to a XIVth Amendment argument, that Sunday regulations in general are constitutional exercises of the police power.
Washington	Wash. Rev. Code, Chapter 9.76.010 to 9.76.050 (1956)	Const. of 1889, Art. I, § 11; Art. XXVI, § 1	yes	yes	yes	yes	*Tacoma* v. *Krech*, 15 Wash. 296, 46 P. 255 (1896). Barber convicted of Sunday barbering in violation of city ordinance. On appeal reversed. Ordinance conflicts with constitutional provision forbidding "special legislation," as it singles out one class of citizens. (Apparently State Constitution.) *State v. Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949). Defendant convicted of selling uncooked meats and groceries on Sunday in violation of comprehensive Sunday closing statute. He appealed, contending that specific exceptions

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							of tobacco, milk, fruit, drugs, etc., made statute discriminatory and unconstitutional. Also argued unconstitutionality on ground of violation of religious freedom and discrimination on the basis of religious beliefs (State and Federal Constitution, XIVth Amendment). Conviction affirmed. Not unconstitutional to pick Sunday. Originally religious day; now secular law, wishing to select a rest day in seven, "quite naturally selected the day already established by the mores of the people."
West Virginia	W. Va. Code Ann., §§ 6072, 6073, 2833(g) (1955) (Cum. Supp. 1960)	Const. of 1872, Art. III, §§ 11, 15; Art. VI, § 47	yes	yes	yes	yes	*State* v. *Baltimore & Ohio Railroad Co.*, 24 W. Va. 783, 49 Am. Rep. 290 (1884). Commerce clause of Federal Constitution not in conflict with a West Virginia statute forbidding Sunday freight-trains, even when offense occurs on an interstate run.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 11.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, FOSTER FURCOLO, GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS AND EDWARD J. McCORMACK, JR., ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

APPELLANTS,

v.

CROWN KOSHER SUPER MARKET OF MASS., INC.,
IRVING HEAFITZ,
MORRIS CHAITOVSKY,
RUTH B. COHEN, and
RABBI MOSES D. SHEINKOPF,

APPELLEES.

BRIEF OF APPELLEES

GOULSTON & STORRS
50 Federal Street
Boston, Massachusetts
RIBICOFF AND KOTKIN
64 Pearl Street
Hartford, Connecticut
FEIN, CAVANAUGH & KIMBALL
1421 Main Street
Springfield, Massachusetts
Of Counsel

HERBERT B. EHRMANN
SAMUEL MARKELL
RAYA S. DREBEN
50 Federal Street
Boston 10, Massachusetts
IRVING S. RIBICOFF
DAVID KOTKIN
64 Pearl Street
Hartford, Connecticut
SAMUEL L. FEIN
1421 Main Street
Springfield, Massachusetts
Counsel for Appellees

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TABLE OF CONTENTS

	Page
I. Statement	1
A. Impact of the Lord's Day Act on Seventh Day Sabbath Observers	1
B. Background of Present Litigation	4
II. Summary of Argument	7
III. Argument	14
A. Procedural Points	14
1. The Individual Plaintiffs Have Standing To Sue	14
2. The Corporate Plaintiff Has Standing To Assert Violation Of Rights Under the First Amendment	16
3. The Three-Judge Court Had Jurisdiction To Enjoin The Defendant Gallagher	19
4. None of the Plaintiffs Is Barred from Maintaining This Suit and the District Court Properly Exercised Its Equitable Jurisdiction	20
a. The Defense of Res Judicata Or Collateral Estoppel Is Not Available On This Appeal	20
b. Even If The Issue of Estoppel Is Properly Before This Court, The Prior Proceedings In The State Court Are Not A Bar To This Action As To The Corporate Plaintiff	21
c. The District Court Properly Exercised Its Equitable Jurisdiction	23
B. The Lord's Day Act Is A Law Respecting An Establishment Of Religion Or Prohibiting The Free Exercise Thereof	26

Page

1. It Is an Act to Enforce the Observance of Sunday as the Sabbath 26
   a. The Act In The Massachusetts Legislature 26
   b. The Act in the Courts of Massachusetts 31
      (1) Cases Not Involving Seventh Day Sabbath Observers 33
      (2) Cases Involving Seventh Day Sabbath Observers 39
2. As A Law To Enforce The Observance Of Sunday As The Sabbath, Mass. G.L. c. 136 Is Unconstitutional 43
3. If Sunday Was Selected Primarily as "A Day of Rest" Because Already Observed as a Day of "Peculiar Sanctity" by the Great Majority, It Would Be Violative of Plaintiffs' Rights Under the First Amendment 46

C. The Lord's Day Act Constitutes a Deprivation Of Liberty And Property Without Due Process Of Law 48

D. The Lord's Day Act Denies To The Appellees The Equal Protection Of The Laws .. 52

IV. Conclusion 56

Table of Citations

Cases

Allen v. *City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1937) 55

Arrigo v. *Lincoln*, 154 Neb. 537, 48 N.W. 2d 643 (1951) 55

Baron v. *O'Sullivan*, 258 F.2d 336, 337 (C.C.A. 3, 1958) 24

Barrows v. *Jackson*, 346 U.S. 249 (1953) 18

Beal v. *Missouri Pacific R. Corp.*, 312 U.S. 45 (1941) 24, 25

Bell v. *Hood*, 327 U.S. 678 (1946) 16

Page

Bennett v. *Brooks*, 91 Mass. (9 Allen) 118 (1864) 34
Brattle Films, Inc. v. *Commr. of Public Safety*, 333 Mass. 58, 61 (1955) 28
Bridges v. *California*, 314 U.S. 252 (1941) 17
Browder v. *Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd 352 U.S. 903 (1956) 8, 9, 10, 20, 22, 24, 25
Buchanan v. *Warley*, 245 U.S. 60 (1917) 19
Burstyn v. *Wilson*, 343 U.S. 495, 505 (1952) 8, 17
Buxton v. *Ullman*, 147 Conn. 48 (1959), prob. juris. noted 28 U.S. L. Week 3346 (U.S. May 23, 1960) (No. 811) 16
Canton v. *Nist*, 9 Ohio St. 439 (1859) 47
Carson v. *Warlick*, 238 F.2d 724 (C.C.A. 4, 1956), cert. den. 353 U.S. 910 (1957) 24
Cincinnati v. *Rice*, 15 Ohio 225 (1846) 47
Cohen v. *Webb*, 175 Ky. 1, 192 S.W. 828 (1917) 47
Colgrove v. *Green*, 328 U.S. 549, 552 (1945) 23
Collins, Ex parte, 277 U.S. 565 (1928) 20
Columbia Broadcasting System v. *United States*, 316 U.S. 407 (1942) 16
Commonwealth v. *Chernock*, 336 Mass. 384 (1957) 5, 9, 11, 21, 22, 24, 41, 42
Commonwealth v. *Dextra*, 143 Mass. 28 (1886) 36, 38
Commonwealth v. *Has*, 122 Mass. 40, 42 (1877) .. 11, 12, 24, 32, 33, 35, 36, 37, 38, 40, 42, 46, 47, 49, 50, 51
Commonwealth v. *Hyneman*, 101 Mass. 30, 31 (1869) .. 40
Commonwealth v. *Kirshen*, 194 Mass. 151 (1907) .. 24, 42
Commonwealth v. *McCarthy*, 244 Mass. 484, 486 (1923) 11, 38, 39
Commonwealth v. *Sampson*, 97 Mass. (1 Browne) 407 (1867) 34
Commonwealth v. *Starr*, 144 Mass. 359 (1887) 24, 42
Commonwealth v. *White*, 190 Mass. 578, 580 (1906) .. 36-38
Coppage v. *Kansas*, 236 U.S. 1, 15-16 (1914) 32

Wisconsin	Wisc. Stat. Ann., § 169.11, § 176.06 (1957)	Const. of 1848, Art. I, §§ 18, 19	repealed	yes	yes	yes	*Stark* v. *Backus*, 140 Wis. 557, 123 N.W. 98 (1908). Wisconsin had a comprehensive Sunday closing law "apparently borrowed from Massachusetts." (Seems to refer to Mass. G.L. c. 136, sec. 5.) In 1909 Wisconsin Legislature added a proviso that haircutting and shaving beards should not be deemed work of necessity or charity. A barber brought an injunction suit to have the law declared unconstitutional and void. He made no attack on Sunday legislation generally, but argued that the 1909 amendment created an invalid classification, and was void under the State Constitution and the XIVth Amendment due process and equal protection clauses. Held, no injunction should issue. 1909 statute only restated what earlier statute had meant anyhow. No discriminatory features. And aside from constitutional questions, plaintiff did not make out a proper case for equity to enjoin criminal prosecution.
Wyoming	Wyo. Comp. Stat. Ann., § 15-160, § 12-19, § 33-112 (1957)	Const. of 1890, Art. I, § 18; Art. VII, § 8; Art. XXI, § 25	yes	yes	no	no	*State* v. *Smart*, 22 Wyo. 154, 136 P. 452 (1913). Smart demurred to an information charging that counter to a statute he kept his liquor store open on Sunday. One of his contentions was that the statute violated XIVth Amendment equal protection clause because of the specific exceptions of many things which could be sold. Held, no violation of equal protection: applies alike to all liquor dealers. Question so certified by lower court, answered accordingly.

Page

Cromwell v. *County of Sac*, 94 U.S. 351 (1876) 9, 22

Davis v. *City of Somerville*, 128 Mass. 594, 596 (1880) 11, 31, 35, 39

Doremus v. *Board of Education*, 342 U.S. 429 (1952) ... 15

Doud v. *Hodge*, 146 F. Supp. 887 (N.D. Ill., 1956), aff'd sub nom. *Morey* v. *Doud*, 354 U.S. 457 (1957) 24, 25

Douglas v. *City of Jeannette*, 319 U.S. 157 (1943) 25

Elliott v. *State*, 29 Ariz. 389, 242 P. 340 (1926) 55

Evers v. *Dwyer*, 358 U.S. 202, 203 (1953) .. 10, 23, 24, 25

Everson v. *Board of Education*, 330 U.S. 1, 15-16 (1947) 12, 44

Ferguson, Ex parte, 62 Okla. Cr. 145, 70 P. 2d 1094 (1937) 55

Fowler v. *Rhode Island*, 345 U.S. 67 (1953) 53

Friedman v. *New York*, 341 U.S. 907 (1951) 45-46

Gayle v. *Browder*, 352 U.S. 903 (1956) 8, 9, 10, 20 22, 24, 25

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U.S. 175 (1938) 20

Grandview Dairy v. *Jones*, 157 F.2d 5 (C.C.A. 2, 1946), cert. den. 329 U.S. 787 (1946) 22

Gronlund v. *Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948) 55

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936) 8, 17

Hague v. *C.I.O.*, 307 U.S. 496 (1939) 19

Harrison v. *N.A.A.C.P.*, 360 U.S. 167 (1959) .. 10, 17, 24, 25

Heald v. *District of Columbia*, 259 U.S. 114, 123 (1922) 15

Henderson v. *Antonacci*, 62 So. 2d 5 (Fla., 1952) 55

Hennington v. *Georgia*, 163 U.S. 299 (1896) 45

Hillsborough Township v. *Cromwell*, 326 U.S. 620 (1946) 24

Hodges, Ex parte, 65 Okla. Cr. 69, 83 P. 2d 201 (1938) 55

Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. 203 (1948) 7, 12, 14, 44

Page

International Harvester Co. v. *Wisconsin Dept. of Taxation*, 322 U.S. 434 (1944) 19

Johns v. *State*, 738 Indiana 332 (1881) 12, 47

Jones v. *Inhabitants of Andover*, 92 Mass. (10 Allen) 18 (1865) 34

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 141, 154, 156, 186-87 (1951) .. 7, 10, 16, 19, 23

Kovacs v. *Cooper*, 336 U.S. 77, 95 (1949) 52

Krieger v. *State*, 12 Okla. Cr. 566, 160 Pac. 36 (1916) .. 47

Kut v. *Albers Super Markets*, 76 Ohio App. 51, 63 N.E. 2d 218 (1945) 47

Lane v. *Wilson*, 307 U.S. 268 (1939) 24

Liggett Co. v. *Baldridge*, 278 U.S. 106 (1928) 18

Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) 23

McCollum, Illinois ex rel, v. *Board of Education*, 333 U.S. 203 (1948) 7, 12, 14, 44

McGrath v. *Merwin*, 112 Mass. 467 (1873) 35

Morey v. *Doud*, 354 U.S. 457 (1957) 24, 25

Morrison v. *Davis*, 252 F.2d 102 (C.C.A. 5, 1958), cert. den. 356 U.S. 968 (1958) 25

Mt. Vernon v. *Julian*, 369 Ill. 447, 454, 17 N.E. 2d 29 (1938) 54-55

N.A.A.C.P. v. *Alabama*, 357 U.S. 449, 458, 460 (1958) . 8, 18, 19

N.A.A.C.P. v. *Patty*, 159 F. Supp. 503, 518-519, (E.D. Va., 1958), mod. sub nom. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 (1959) 17

New York v. *Friedman*, 302 N.Y. 75, 96 N.E. 2d 184 (1950), appeal dismissed for want of a substantial federal question, 341 U.S. 907 (1951) 46

Opinion of the Justices, 300 Mass. 615 (1938) 13, 49

Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U.S. 196 (1924) 24

Pearce v. *Atwood*, 13 Mass. (13 Tyng) 324 (1816) 33

Page

Pearl Assurance Co. v. *Harrington*, 38 F. Supp. 411 (D. Mass., 1941), aff'd 313 U.S. 549 (1941) 18-19

Pennekamp v. *Florida*, 328 U.S. 331 (1946) 13, 51

People v. *Bellet*, 99 Mich. 151, 57 N.W. 1094 (1894) .. 47

People v. *C. Klinck Packing Co.*, 214 N.Y. 121, 108 N.E. 278 (1915) 45

Petit v. *Minnesota*, 177 U.S. 164 (1900) 45

Philadelphia Co. v. *Stimson*, 223 U.S. 605, 621 (1912) 10, 24

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) .. 7, 8, 13, 16, 18, 49

Public Bank, Ex parte, 278 U.S. 101 (1928) 20

Schempp v. *School District of Abington Township*, 177 F. Supp. 398, 403 (E.D. Pa., 1959) 15

Schneider v. *Irvington*, 308 U.S. 159, 161 (1939) 51

Society for Savings v. *Bowers*, 349 U.S. 143, 151 (1955) 32

Society of Sisters v. *Pierce*, 296 F. 928 (D. Ore.), aff'd 268 U.S. 510 ..... 13, 49

Smith v. *Cahoon*, 283 U.S. 553, 566-567 (1931) 14, 54

Soon Hing v. *Crowley*, 113 U.S. 703 (1885) 45

Spielman Motor Sales Co. v. *Dodge*, 295 U.S. 89, 96 (1935) 8, 20, 25

Springfield, City of, v. *Smith*, 322 Mo. 1129, 19 S.W. 2d 1 (1929) 55

Stefanelli v. *Minard*, 342 U.S. 117 (1951) 25

Sterling Drug v. *Anderson*, 127 F. Supp. 511 (E.D. Tenn., 1954) 25

Terrace v. *Thompson*, 263 U.S. 197 (1923) 7, 8, 16, 18, 24, 25

Tileston v. *Ullman*, 318 U.S. 44 (1943) 16

Toomer v. *Witsell*, 334 U.S. 385 (1948) 25

Truax v. *Corrigan*, 257 U.S. 312 (1921) 18

Truax v. *Raich*, 239 U.S. 33 (1915) 16

Tudor v. *Board of Education*, 14 N.J. 31, 100 A. 2d 857 (1953) 44

Page

Turman v. *Duckworth*, 329 U.S. 675, footnote 6 p. 678 (1946) 23
United States v. *Caroline Products Co.*, 304 U.S. 144, footnote 4 p. 152 (1938) 52
United States v. *Moser*, 266 U.S. 236 (1924) 9, 22
Watchtower Bible and Tract Society v. *Los Angeles County*, 181 F.2d 739 (C.C.A. 9, 1950) 8, 18
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624, 639 (1943) 51
Zorach v. *Clauson*, 343 U.S. 306 (1952) 7, 12, 15, 44

Constitutional Provisions, Statutes, and Rules

United States Constitution:
Commerce Clause 45
First Amendment .. 8, 12, 13, 16, 17, 44, 45, 46, 51, 52
Fourteenth Amendment 45
Equal Protection Clause 13-14, 52, 53, 54, 55
Massachusetts Constitution 40, 42
Eleventh Amendment 31-32
28 U.S.C. § 2281 20
Federal Rules of Civil Procedure, Rule 52(a) 2
Revised Rules of the Supreme Court of the United States:
Rule 15 c 9
Rule 15 c 1 20
Rule 40(2) 20
Massachusetts Gen. Laws (Ter. Ed.) c. 136 ..... 4, 5, 12, 42, 43, 54
Sec. 2 ..... 29, 51
Sec. 3 28
Sec. 4 ..... 28, 29, 51
Sec. 4A 30, 51
Sec. 4B 30
Sec. 5 ..... 4, 36
Sec. 6 ..... 28, 30, 39, 40, 51, 53

Page

Sec. 6, paragraph 2 ..... 27, 30, 49
Sec. 6, paragraph 3 ..... 49, 50
Sec. 6, paragraph 4 ..... 27, 30, 50
Sec. 6, paragraph 5 ..... 28, 30, 47, 50
Sec. 6, paragraph 6 50
Sec. 6, paragraph 8 ..... 30, 50
Sec. 6, paragraph 9 50
Sec. 7 ..... 27, 53
Sec. 10 29
Sec. 11 29
Sec. 12 28
Sec. 17 51
Sec. 21 ..... 30, 51
Sec. 22 ..... 29, 51
Sec. 26 51
Sec. 27 ..... 29, 51
c. 149 ..... 27, 48
Sec. 48 27
Gen. Sts., c. 84, sec. 9 40
Lord's Day Statute of 1791, c. 58 ..... 34, 36, 38
4 Prov. Laws, (State ed.) 415 37
Prov. St. 1760-61, c. 20, §1 37

Miscellaneous

Brief of Appellants, *Braunfeld* v. *Gibbons*, October Term, 1960 #67 ..... 14, 52
"Declaratory Judgments in the Federal Courts", 49 Harv. L. Rev. 1351 (1936) 23
"Developments in the Law—Res Judicata", 65 Harv. L. Rev. 818, 874-880 (1952) 22
Record, *Commonwealth* v. *Has* 40
Restatement, Judgments, §70, Comment c 22
§93, Illustration 5 22
Websters' New International Dictionary, Second Edition, 1957 28

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APPELLANTS,

v.

CROWN KOSHER SUPER MARKET OF MASS., INC.,
IRVING HEAFITZ,
MORRIS CHAITOVSKY,
RUTH B. COHEN, and
RABBI MOSES D. SHEINKOPF,

APPELLEES.

BRIEF OF APPELLEES

I.
Statement

A. *Impact of the Lord's Day Act on Seventh Day Sabbath Observers.*

The complaint brought by the appellees in the district court was brought on behalf of a corporation, Crown

Kosher Super Market of Massachusetts, Inc.; three Orthodox Jewish customers of Crown Kosher on behalf of themselves and many others similarly situated; the Chief Orthodox Rabbi of Springfield for himself and on behalf of members of the Massachusetts Council of Rabbis, constituting approximately fifty in number.

All of the four stockholders of the corporation, its officers and directors are Orthodox Jews. Attached to the complaint as Exhibit "B" is a list of approximately four hundred Sunday customers of Crown Kosher, most of whom are Saturday Sabbath observers, all of whom signed their names personally to a petition in the Crown Kosher Super Market to indicate their solidarity with the plaintiffs in the suit below. (R. pp. 23-31, 109, 124).

The plaintiffs are not merely asserting abstract rights. The complaint alleges, and the court found that the Lord's Day Act interferes with and substantially injures these plaintiffs and those whom they represent in the exercise of their liberty and the use of their property. This conclusion of the district court involved subsidiary findings made under Rule 52(a) of Federal Rules of Civil Procedure concerning the proper observance of the Jewish Sabbath and the impact of the Act on the several plaintiffs. The following is a summary of some of these findings:

Due observance of the Jewish Sabbath requires total abstinence from business and work. Because of the religious beliefs of its officers, directors and stockholders, Crown Kosher is not open between sundown on Friday and sundown Saturday. Even if the store were open, the great majority of its patrons could not take advantage of its opening.

These Orthodox and Conservative customers may not ride in automobiles or other conveyances, or even walk extraordinary distances on their Sabbath. They may not shop or cook on the Sabbath, and spend most of the day-

light hours on Friday preparing for meals served during the twenty-four hours of the Sabbath, especially for the traditional family feast on Friday night.

Since Orthodox and other Sabbath observing Jews cannot shop on Friday night or Saturday and have spent the Sabbath as a day of rest or religious celebration and family communion, Sunday is the only day which has for them the advantages, as a shopping day, that Saturday has for the majority of people. Consequently, more than one-third of Crown Kosher's weekly gross sales are made on Sunday.

Business considerations make it impracticable to operate the Crown Kosher Market on Saturday night. If, after sundown, the store were prepared for business, few hours would remain before closing and the twelve employees (six of whom are butchers) would demand extra wages. Most customers would find it inconvenient, if not impossible, to shop during those night hours, especially those who have to travel significant distances, starting after sundown. For economic reasons similar to those preventing operation on Saturday night, it would not be practicable for Crown Kosher to sell only kosher meat from 6:00 AM to 10:00 AM on Sunday, as permitted by law. The few sales would not justify the great expense. (R. pp. 135-136).

If the Lord's Day Act is constitutional; the Crown Kosher Market can be open only five days of the week, none of which includes a day of the weekend when a large percentage of the week's sales is normally made. Even assuming that the store could stay in business on such a basis, it can do so only under great handicaps compared with other supermarkets. Also, Crown Kosher's Orthodox customers lose much of the value of their Sunday, since they may not shop on either Saturday or Sunday. Thus, the law puts an economic penalty on those who observe some other day than Sunday as the Sabbath by depriving

them of the productive use of one day further in the week. (R. pp. 145-146).

The law also imposes difficulties on the Rabbi-plaintiffs. They are hindered in their function of supervising the food to be eaten by the members of their congregations and they suffer great detriment in their efforts to have their congregations preserve due observance of the Jewish Sabbath and the dietary laws.

In addition to examining the direct effect of the statute on those who observe the seventh day of the week as their Sabbath, the district court found that the Lord's Day Act furnishes special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection to Christians and Jews who observe Saturday as the Sabbath to the prejudice of the latter.

B. *Background of Present Litigation.*

The plaintiffs below brought their suit before the three-judge United States District Court because the defendant was threatening to enforce the provisions of the Lord's Day Act against the corporate plaintiff.

The complaint as amended alleged that "unless restrained by this court the defendant will enforce G.L. (Ter. Ed.) c. 136, section 5" against the corporate plaintiff. (R. p. 36.)

At the time of the trial, a stipulation signed by counsel for both parties, was filed with the court, which read as follows:

> "I. Unless restrained in these proceedings, the defendant will enforce the provisions of Mass. G.L. (Ter. Ed.) c. 136 to the full extent of his authority." (R. p. 40).

There were certain prior state court proceedings which related to the enforcement of the Lord's Day Act. In order to eliminate the necessity of producing evidence concerning these proceedings, the following stipulation signed by counsel for both parties was filed with the court:

"II. There is no case now pending in the state courts of Massachusetts against the corporate plaintiff or its Manager, Harold Chernock, involving the enforcement of Mass. G.L. (Ter. Ed.) c. 136 or by either of them to stay proceedings under said Act.

The corporate plaintiff's Manager, Harold Chernock, was convicted by the District Court of Springfield for keeping open a shop on Sunday in violation of G.L., c. 136 at the address of the corporate plaintiff; the said Chernock appealed to the Superior Court for Hampden County and was convicted after trial. Thereafter, the said Chernock took his exceptions to the Supreme Judicial Court of Massachusetts. These exceptions were subsequently overruled in an opinion, *Commonwealth* v. *Chernock*, Mass. A.S. 1057 on November 13, 1957.

After the proceedings in the District Court of Springfield, the corporate plaintiff filed a bill in equity in the Superior Court of Hampden County to restrain Raymond [fol. 40] P. Gallagher, Chief of Police of the City of Springfield, from serving further complaints upon the petitioner until such time as the case of *Commonwealth* v. *Chernock* had been decided. The court issued such a preliminary injunction. Following the decision in *Commonwealth* v. *Chernock*, a final decree was entered dismissing the bill in equity." (R. p. 41).

The hearing proceeded on the basis of the foregoing stipulations. Indeed the only references by counsel to the suit in equity was to confirm the facts as stated in the stipulation. (R. p. 114, pp. 128-129).

Almost seven months after the trial, District Judge McCarthy, upon his own initiative, filed a group of papers with his dissenting opinion. These were made a basis for a motion for a new trial by the Attorney General. (R. p. 178). The motion was denied and the court filed a per curiam opinion. (R. pp. 179-182).

After giving a number of reasons why the court would not reopen the case because of these papers, the opinion concluded that "more important" was the fact that the movant wholly failed to demonstrate that "any new evidence is available which would affect the result." (R. p. 182).

These papers have now been printed as a "Supplemental Transcript of Record" in this appeal. Appellants' brief makes profuse references to them, and contains many assertions as to their meaning and effect some of which seem in direct conflict with the stipulation.

Contentions in appellants' brief based on these papers do not appear to be properly before this Court. They were not mentioned in the Jurisdictional Statement, nor were the papers themselves printed in the Statement as part of Judge McCarthy's opinion.

Appellees submit, as stated in the per curiam opinion, that these papers, even if properly before this Court, would not, in any event, affect the result of this litigation.

II.

Summary of Argument

A. *Procedural Points.*

1. The Individual Plaintiffs have Standing to Sue.

The Rabbis and the Orthodox Jewish customers have sufficient interest in the application of this statute to urge its unconstitutionality. cf. *Zorach* v. *Clauson*, 343 U.S. 306; *Illinois ex rel McCollum* v. *Board of Education*, 333 U.S. 203.

The Lord's Day Act imposes upon the Rabbi plaintiff, those Rabbis whom he represents and upon their congregations the Sabbath of other religious sects. It also directly hampers the Rabbis in the performance of their religious duties relating to the preservation of the Jewish Sabbath and the dietary laws of Orthodox Jewry.

While the Lord's Day Act protects those sects which celebrate Sunday as the Lord's day, it does not furnish similar protection to the individual customer plaintiffs, those whom they represent, and others who observe Saturday as the Sabbath. The Act also severely hampers these plaintiffs in obtaining the food required by their religion.

Although the statute makes no direct demands upon the individual plaintiffs, it violates their rights by unlawful public action and they are entitled to relief. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 141; *Pierce* v. *Society of Sisters*, 268 U.S. 510.

These plaintiffs may also assert the rights of the corporate plaintiff because the Act operates directly upon the consummation of sales between the corporation and the customers. *Terrace* v. *Thompson*, 263 U.S. 197.

2. The Corporate Plaintiff has Standing to Assert Violation of Rights Under the First Amendment.

Cases permitting corporations to challenge statutes on due process grounds because of violations of freedoms under the First Amendment, *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Burstyn* v. *Wilson*, 343 U.S. 495, are particularly apposite here since the items sold by the corporation have religious significance cf. *Watchtower Bible and Tract Society* v. *Los Angeles County*, 181 F.2d 739 (CCA 9).

Furthermore, the corporate plaintiff may, in defense of its property, assert the religious rights of others involved in the same matter. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Terrace* v. *Thompson*, 263 U.S. 197.

3. The Three-Judge Court had Jurisdiction to Enjoin the Defendant, Gallagher.

The defendant Gallagher was not acting as a "purely local officer," but was acting on behalf of the Commonwealth of Massachusetts enforcing a law of state-wide concern. *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.), aff'd 352 U.S. 903; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89.

The very fact that the appellants in this suit include the Attorney General and the Governor of the Commonwealth of Massachusetts indicates that this is not merely a matter of local interest.

4. None of the Plaintiffs Is Barred from Maintaining This Suit and the District Court Properly Exercised Its Equitable Jurisdiction.

a. Arguments based on res judicata or collateral estoppel are not available to appellants on this appeal,

since such questions have not been properly presented to this Court. Res judicata or collateral estoppel is an affirmative defense and is not fairly comprised within the question "Should the Court have exercised its equitable jurisdiction?" Supreme Court Rules, Rule 15c.

b. Even if these affirmative defenses are properly before this Court, the prior proceedings in the state courts do not bar any of the plaintiffs from maintaining this action.

The bill in equity brought by the corporate plaintiff in the state court was merely to secure a stay of further complaints by the defendant until the appeal in *Commonwealth v. Chernock*, 336 Mass. 384 (1957) could be decided. After the decision, the subject matter of the suit in equity became moot and the action properly dismissed without reaching the merits. That suit does not bar the corporate plaintiff from bringing the present proceedings.

The criminal action which reached final judgment was brought against an individual, Harold Chernock. The corporate plaintiff was not a party to that suit. This proceeding is not brought to review the prior conviction but seeks to restrain the defendant from starting new criminal complaints. Even Harold Chernock could join as a plaintiff in this suit. In a new prosecution in the state court, Chernock could raise the federal unconstitutionality of this statute as this defense was not raised in the earlier prosecution. *Cromwell v. County of Sac*, 94 U.S. 351; *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), aff'd 352 U.S. 903. Therefore, he would not be barred from raising this defense here, especially since this question is purely a question of law. See *U.S. Moser*, 266 U.S. 236. It is clear that neither the corporate plaintiff nor the individual plaintiffs are barred by Chernock's conviction.

c. The Three-Judge Court Properly Exercised Its Equitable Jurisdiction.

The individual plaintiffs are entitled to equitable relief, *Evers* v. *Dwyer*, 358 U.S. 202, as this is the "*only* method" by which they can vindicate their constitutional rights. (R. 139).

Unless the defendant is hereby enjoined, the corporate plaintiff will be subject to multiple prosecutions, and if required to close on Sundays, will lose more than one-third of its gross sales. Where essential to property rights, equity will enjoin enforcement of criminal statutes. See *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, concurring opinion of Frankfurter, J. at 156, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605.

Any policy of deference to state courts is inapplicable since authoritative construction of the statute has already been made by the highest Massachusetts court. Compare *Harrison* v *N.A.A.C.P.*, 360 U.S. 167. The only question not decided is purely one of Federal law where the policy of abstention is wholly inapplicable. *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.); aff'd 352 U.S. 903.

B. *The Lord's Day Act Is a Law Respecting an Establishment of Religion or Prohibiting the Free Exercise Thereof.*

1. It is an Act to Enforce the Observance of Sunday as the Sabbath.

a. The Act in the Massachusetts Legislature.

Although it is universally agreed that the Lord's Day Act, when enacted, had for its purpose the enforcement of the observance of the Sabbath, appellants' brief contends

that "by passage of time it has now become a regulation providing for a uniform day of rest and recreation." (p. 43).

An examination of the Lord's Day Act with all of its amendments indicates that nothing of the kind ever occurred.

The amendments to the Act are almost wholly concerned with increasing the number of activities which can be carried on for seven days a week instead of six. Moreover, the exemptions show a clear intention to preserve religious observance of the day. They are carefully worded so as to protect the hours of church worship on Sunday and constantly distinguish secular days and business from Sunday which requires "due observance".

b. The Act in the Courts of Massachusetts.

The decisions of the Massachusetts Supreme Judicial Court have viewed the Lord's Day Act as primarily a statute to enforce the observance of the Sunday Sabbath by penal legislation. *Davis* v. *City of Somerville*, 128 Mass. 594 (1880). A departure from this judicial view occurred in *Commonwealth* v. *Has*, 122 Mass. 40 (1877), where the court characterized the Lord's Day Act as a mere "civil regulation". Subsequent to that decision, until *Commonwealth* v. *Chernock*, 336 Mass. 384 (1957), the court resumed its view that the purpose of the Act was "to secure respect and reverence for the Lord's Day". *Commonwealth* v. *McCarthy*, 244 Mass. 484 (1923).

The history and text of the Act and its almost continuous characterization by the Massachusetts Supreme Court, all combine to justify the finding of the district court that its purpose was to enforce the observance of Sunday as the Sabbath.

2. As a Law to Enforce the Observance of Sunday as the Sabbath, Mass. G.L., C. 136 is Unconstitutional.

The plaintiffs who are already under great social and economic pressure to conform to the customs of the majority, are, by virtue of the Lord's Day Act, compelled either to observe the Sabbath of another faith, or suffer severe hardship.

Application of the principles enunciated by this Court in a series of leading decisions make it clear that the Lord's Day Act is

> "a law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Everson v. *Board of Education*, 330 U.S. 1; *Illinois ex rel McCollum* v. *Board of Education*, 333 U.S. 203; *Zorach* v. *Clauson*, 343 U.S. 306.

3. If Sunday was Selected Primarily as "a Day of Rest" Because Already Observed as a Day of "Peculiar Sanctity" by the Great Majority, it Would be Violative of Plaintiffs' Rights Under the First Amendment.

Commonwealth v. *Has*, 122 Mass. 40, stated that Sunday was chosen as the day of rest "because a great majority of the people celebrate it as a day of peculiar sanctity". If such be the explanation, the Act intentionally relieves the followers of the majority faith from the burden of abstaining from secular pursuits for two days, but makes no provision for minorities who already so abstain on Saturday. In doing this, it favors one religion over another. Therefore, the Act is unconstitutional unless it exempts from its operation those who observe the seventh day as the Sabbath. See *Johns* v. *State*, 78 Indiana 332.

C. *The Lord's Day Act Constitutes a Deprivation of Liberty and Property Without Due Process of Law.*

As a civil regulation to enforce a "fixed period of rest", the Lord's Day Act bears no legitimate or reasonable relation to the public health or general welfare. Therefore, it is beyond the police power of the state so to interfere with the liberties of its citizens. *Society of Sisters* v. *Pierce*, 296 F. 928 (D. Ore.), aff'd 268 U.S. 510; *Opinion of the Justices*, 300 Mass. 615.

Even if we assume that it is a proper function of the state to make everybody rest on the same day each week, the Lord's Day Act as it stands today is no longer adapted to this purpose. Its manifold exemptions do not promote the "rest". In fact, many of the activities and the hours in which they are permitted indicate disturbance of rest.

In this case, basic First Amendment rights are abridged by the Lord's Day Act. To justify this curtailment, the danger to the public welfare must be serious and imminent. cf. *Pennekamp* v. *Florida*, 328 U.S. 331. No such condition is present here.

D. *The Lord's Day Act Denies to the Appellees the Equal Protection of the Laws.*

Whether it is a law to enforce observance of Sunday as the Sabbath or is a law to compel rest on Sunday because the great majority already observe it as a day of peculiar sanctity, the Lord's Day Act denies to the appellees, the equal protection of the laws.

Furthermore, without any rational basis for distinctions, the Act permits many businesses to be operated and many commodities to be sold on Sunday. Some of these are competitive with the corporate plaintiff's business. Many of these exceptions seem to have no basis other than successful

pressure on the legislature. This type of Sunday legislation is unconstitutional as a denial to the corporate appellee of the equal protection of the laws. cf. *Smith* v. *Cahoon*, 283 U.S. 553.

III.

Argument

A. *Procedural Points*

1. The Individual Plaintiffs Have Standing to Sue.

The district court found that:

> "What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances to those Christian sects and to Orthodox and Conservative Jews, who observe Saturday as the Sabbath and to the prejudice of the latter group." (R. p. 145)

Rabbi Sheinkopf brings this suit in his individual capacity as spiritual leader of the Orthodox Jews in Springfield and in a representative capacity for all the Orthodox Rabbis of Massachusetts. He is the religious leader of a sect severely impeded in adhering to one of its most basic tenets, the preservation of its Sabbath[1] by a statute which preserves and imposes on him and his congregation the Sabbath of other religious sects. His interest is analagous to that of the parents in *Illinois ex rel McCollum* v. *Board*

[1] See Appellants' brief in *Braunfeld* v. *Gibbons*, October Term 1960, #67, pp. 10 14.

of Education, 333 U.S. 203. (1948) and *Zorach* v. *Clauson*,[2] 343 U.S. 306. (1952).

More specifically the complaint alleges that the Rabbi plaintiffs cannot fulfill their religious functions relating to the dietary laws of Orthodox Jewry. (R. p. 16) The act challenged operates directly upon the functions of the Rabbis-plaintiff, and if enforced they "would be hindered in their function of supervising the food to be eaten by the members of their congregations and they would also suffer great detriment in their efforts to preserve, in these circumstances, due observance of the Jewish Sabbath and of the dietary laws by them." (R. p. 146).

Similarly, the plaintiff customers claim direct infringement of their religious liberties. This is a constitutional claim which every member of the prejudiced group would have standing to assert. (R. p. 145). Each member is "within the class of persons with respect to whom the act is unconstitutional" and "the alleged unconstitutional feature injures him." Compare *Heald* v. *District of Columbia*, 259 U.S. 114, 123, (1922).

There are more specific allegations and findings of the court which show direct injury to the religious liberty of the customer plaintiffs. They are seriously inconvenienced in procuring food prepared in accordance with the dietary regulations of their religion, and they are under a very substantial disadvantage as compared with shoppers whose Sabbath is observed on Sunday. They can only shop on five days in each week, whereas those who observe Sunday may make purchases on six days of each week. The result

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[2] The fact that the parents in these cases on appeal from state courts had standing is a precedent for standing in a federal court. *Schempp* v. *School District of Abington Township*, 177 F. Supp. 398 at 403, (E.D. Pa. 1959), since this Court's findings of direct adverse interest, a requisite of standing, is independent of state court decision. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

of the law is the loss by the individual plaintiffs of much of "the value of their Sunday." (R. p. 16, 17, 145-146).

Although the individual plaintiffs are not subject to prosecution under the Lord's Day Act, this Court has long granted relief to parties "whose legal rights have been violated by unlawful public action although such action made no direct demands upon them." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 141 (1951); *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Truax* v. *Raich*, 239 U.S. 33 (1915).

Appellants state in their brief (p. 26) that the standing of the individual plaintiffs to complain here of a denial of the free exercise of religion is not easily separated from consideration of the merits. However, whether or not the individual plaintiffs are finally entitled to relief does not determine whether they have standing to claim infringement of constitutional rights. The allegations of the complaint determine this question. *Accord*, *Bell* v. *Hood*, 327 U.S. 678 (1946). In the instant case the allegations claim direct interference with the plaintiffs' religious liberty. In *Tileston* v. *Ullman*, 318 U.S. 44 (1943), a case much relied upon by the appellants, this Court took pains to point out that the allegations did not claim infringement of plaintiff's liberty or property rights.[3]

2. The Corporate Plaintiff Has Standing To Assert Violation Of Rights Under the First Amendment.

Crown Kosher Super Market, the corporate plaintiff, caters primarily to Orthodox and Conservative Jews in

[3] Note that this Court has noted probable jurisdiction in *Buxton* v. *Ullman*, 147 Conn. 48 (1959), prob. juris. noted 28 U.S.L. Week 3346 (U.S. May 23, 1960) (No. 811), where the same Connecticut statute is again challenged by a physician, but here asserting alleged constitutional infringement of his own rights.

Springfield and the surrounding areas. It is the only super market supplying these Jews with kosher meat and other foods meeting the special and complex dietary regulations required by their religion. Because of the religious convictions of its stockholders, officers and managers, the store remains closed on the Jewish Sabbath, and because of the religious convictions of its Orthodox and Conservative customers, the latter would not make purchases on that day. Moreover, in order to preserve the religious significance of the products sold, the market must remain closed on Saturday. If it were open, it would not qualify as a kosher market on the remaining days of the week.

The complaint alleges that the corporate plaintiff will lose approximately one-third of its gross business if required to stay closed on Sunday. (R. p. 17). It is admitted that the corporate plaintiff may be prosecuted if it remains open on Sunday. (R. p. 54). The decisions of this Court clearly establish that the corporate plaintiff may attack the statute.

There is an important series of cases which permit corporations to challenge statutes directly on due process grounds because of violations of freedoms of the First Amendment. Thus in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), *Bridges* v. *California*, 314 U.S. 252 (1941), and, more recently, in *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), corporations asserted rights of freedom of press and speech. Also, *N.A.A.C.P.* v. *Patty*, 159 F. Supp. 503, 518-519 (E. D. Va. 1958) modified sub nom. *Harrison* v. *N.A.A.C.P.* 360 U.S. 167 (1959).

Appellees submit that Crown Kosher may similarly raise questions "under the First Amendment's guaranty of separation of church and state," see *Burstyn* v. *Wilson* supra at 505, especially since here state action interferes with the availability of goods having a religious significance. Obviously, it is irrelevant whether the kosher food

is sold by a corporation or by an individual. cf. *Watchtower Bible & Tract Society* v. *Los Angeles County*, 181 F.2d 739 (C.C.A. 9, 1950).

Even if, contrary to appellees' contention, the corporation is not allowed directly to challenge the statute on religious grounds, it may assert in defense of its property rights the constitutional rights of its customers, its stockholders and other Orthodox and Conservative Jews. This Court has repeatedly held that individuals and corporations may assert in defense of their property rights the constitutional rights of others involved in the same law or act.

The leading case on this point, and factually very close to the case at bar, is *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), where two schools, one religious and one military, could, in the protection of their property interests,[4] assert that a statute which made it a misdemeanor for parents not to send children to public school interfered unlawfully with the liberty of the parents.

Similarly, in *Terrace* v. *Thompson*, 263 U.S. 197 (1923) where a land owner wanted to lease land to an alien in violation of a state statute, it was held that both the owner and the alien had standing to attack the statute. "The owners have an interest in the freedom of the alien and he has an interest in their freedom to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them."[5] Other cases to this effect are *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 at 460, (1958); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Pearl Assurance Co.* v. *Harrington*, 38 F. Supp.

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[4] It is entirely irrelevant for purposes of standing what percentage of sales are threatened by the state's action. Obviously, one-third of a corporation's business is still a property right. See, *Truax* v. *Corrigan*, 257 U.S. 312 (1921); *Liggett Co.* v. *Baldridge*, 278 U.S. 106 (1928).

[5] Thus the individual plaintiffs may also assert the rights of Crown Kosher.

411. (D. Mass. 1941), aff'd 313 U.S. 549 (1941); and *Buchanan* v. *Warley*, 245 U.S. 60 (1917). See also *International Harvester Co.* v. *Wisconsin Dept. of Taxation*, 322 U.S. 434 (1944) where a corporation was allowed to raise the constitutional objections of its stockholders.

If appellants' contention is correct that the individual customers and Rabbis do not have standing, it becomes even more important that the corporate plaintiff be allowed to assert their rights. The need to protect fundamental rights of persons who would find it difficult to present their grievances is always a factor given weight by this Court.[6]

Even in cases where property interests were not necessarily involved, corporations were permitted to assert rights of its members. *Joint-Anti Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 154, 186-187 (1951) (concurring opinion Frankfurter, J.; concurring opinion of Jackson, J.); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958).

Surely, in the present case, where property rights are clearly involved, and where the corporation has a close connection with its officers, stockholders and customers, the corporation has standing to assert their rights.

3. The Three-Judge Court Had Jurisdiction To Enjoin The Defendant, Gallagher.

It seems clear that in enforcing the criminal law of the Commonwealth, the Police Chief was acting on behalf of the Commonwealth of Massachusetts and not merely as a local officer. The appellants themselves recognize the interest of the Commonwealth in enforcing the Lord's Day

[6] The fact that others could assert the same rights may be the reason for some of the opinions (none of which was acceded to by a majority of the Court), in *Hague* v. *C.I.O.*, 307 U.S. 496 (1939). Moreover, in view of *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 at 458, 459 (1958) the statements in the earlier case are open to question.

Act since both the Attorney General and the Governor of Massachusetts are appellants in this suit. The Jurisdictional Statement (p. 6) claims that "a determination that the statute is unconstitutional will have a profound effect on the economy of the Commonwealth."

The very decisions cited by appellants indicate that the challenged statute embodies a policy of state-wide concern and is not a matter of local application. Compare *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935) and *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U.S. 903 (1956) with *Ex parte Public Bank*, 278 U.S. 101 (1928) and *Ex parte Collins*, 277 U.S. 565 (1928). Since defendant Gallagher is performing his duty "in the interest of the state and not simply in the interest of the locality where he serves" *Spielman Motor Sales Co.* v. *Dodge*, supra, the three judge court had jurisdiction. 28 U.S.C. §2281.

4. None of the Plaintiffs Is Barred from Maintaining This Suit and the District Court Properly Exercised Its Equitable Jurisdiction.

a. The Defense Of Res Judicata Or Collateral Estoppel Is Not Available On This Appeal.

Appellants argue that the corporate plaintiff is barred by some application of the doctrine of "res judicata" or "collateral estoppel" from raising the federal issue in this case.

However, even if this claim were valid, which appellees deny, res judicata or collateral estoppel cannot be now raised on this appeal. It was not a question set forth or fairly comprised within the Jurisdictional Statement as required by Rules 15 (c) 1 and 40 (2), Sup. Ct. Rules, cf. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175 (1938). Appellants' Notice of Appeal contained

the following as the third question presented: "Should the Court have exercised its equitable jurisdiction?" Res judicata and collateral estoppel are affirmative defenses and are quite different from the considerations determining equitable jurisdiction.

The very statement of facts in appellants' Jurisdictional Statement indicates that these affirmative defenses were not there contemplated. The argument raised in the brief is based both on a peculiar merging of Harold Chernock and the corporation, and on the alleged nature of a civil proceeding brought in the state court by the corporate plaintiff herein. However, in their Jurisdictional Statement, appellants did not claim "substantial identity" of Crown Kosher and Harold Chernock. They did not even annex to the Statement the documents (Supplemental Record) which they assert justify this claim. They even erroneously asserted that the state equity proceeding was brought by Chernock (Jurisdictional Statement, p. 7). Appellees submit, therefore, that this Court should not consider the argument based on res judicata or collateral estoppel.

b. Even If The Issue of Estoppel Is Properly Before This Court, The Prior Proceedings In The State Court Are Not A Bar To This Action As To The Corporate Plaintiff.[7]

The equity proceeding brought by the present corporate plaintiff in the state court merely sought to restrain enforcement of the Act pending final disposition of Chernock's appeal to the Massachusetts Supreme Judicial Court. It was not a bill which questioned the validity of the Lord's Day Act. Quite the contrary, it sought a stay until the appeal in *Commonwealth* v. *Chernock* could adjudicate the validity of the Act.

[7] It is, of course, apparent that the individual plaintiffs can in no way be connected with the state proceedings.

After the decision in *Commonwealth* v. *Chernock*, the complaint was properly dismissed. As shown by the stipulation, the Supplementary Transcript and the per curiam finding of the district court, this civil action "never reached the merits before its dismissal as moot." (R. 182). Therefore, it was not a final judgment.

The criminal proceedings against the individual Harold Chernock reached final judgment. The corporate plaintiff here was not a party to that suit, and hence the rules of estoppel do not apply. Restatement, Judgments § 93, Illustration 5. (1942).

Moreover, the prior conviction of Chernock would not even bar him from maintaining the present suit. The instant action is not an attempt to review his conviction for alleged violations of the statute in 1954, but is brought to restrain new prosecutions. Since the defense of federal constitutionality was not raised in the criminal case, Chernock himself is not estopped to raise it in a new prosecution and hence could raise it here. *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876), Restatement, Judgments, § 70, Comment c.[8] *Accord, Brouder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U.S. 903. (1956). This is particularly true since the question not litigated was one purely of law. *Grandview Dairy* v. *Jones*, 157 F.2d 5 (C.C.A. 2, 1946), cert. denied 329 U.S. 787 (1946). See *U. S.* v. *Moser*, 266 U.S. 236 (1924). For these reasons any argument based upon merging Chernock and the corporate plaintiff into a single identity is irrelevant.

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[8] Although the Restatement does not purport to cover the scope of res judicata in criminal proceedings, it is apparent that courts would, if anything, be less apt to allow defenses on the grounds of collateral estoppel in criminal than they would in civil cases. See *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 874-880 (1952).

c. The District Court Properly Exercised Its Equitable Jurisdiction.

Plaintiffs in this suit seek a declaratory judgment and an injunction against enforcement of the challenged statute. The same considerations determining the standing of the plaintiffs determine whether a declaratory judgment should issue[9] and the justiciability of the suit. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, concurring opinion pp. 150-157 (1951):

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality . . ." *Evers* v. *Dwyer*, 358 U.S. 202, 203 (1958) quoting from *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

In the present case, there is a substantial controversy between all the individual plaintiffs, and the Commonwealth. It is only by equitable relief that they can vindicate their constitutional rights.

The defendant admitted that there exists an actual controversy between it and the corporate plaintiff. (R. p. 38). Unless these proceedings enjoin the enforcement of the Act, Crown Kosher will be subject to multiple prosecutions. It was stipulated, that unless here enjoined, the defendant would enforce the challenged statute to the full extent of

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[9] While the same criteria apply to declaratory judgments as to injunctions in determining justiciability, *Colgrove* v. *Green*, 328 U.S. 549 (1945) there may be "freer movement of the federal courts within the recognized confines of the scope of equity", ibid p. 552. See *Note, Declaratory Judgments in the Federal Courts*, 49 Harv. L. Rev. 1351 (1936), and footnote 6 of Rutledge, J. in *Turman* v. *Duckworth*, 329 U.S. 675 at 678 (1946), indicating that declaratory judgments may be appropriate in cases where a court would hesitate to issue an injunction.

his authority. (R. p. 40). The corporate plaintiff alleged, and the district court found, that if required to close down on Sunday, the corporate plaintiff would lose more than one-third of its gross business. (R. p. 13, 136).

Despite these circumstances which clearly present a case for equitable relief, *Ervers* v. *Dwyer*, 358 U.S. 202 (1958); *Browder* v. *Gayle*, 142 F. Supp. 707, (M. D. Ala. 1956) aff'd 352 U.S. 903 (1956); *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Doud* v. *Hodge*, 146 F. Supp. 887 (N. D. Ill. 1956), aff'd sub. nom. *Moreg* v. *Doud*, 354 U.S. 457 (1957); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 621 (1912); cf. *Beal* v. *Missouri Pacific R. Corp.*, 312 U.S. 45 (1941), appellants urge that the district court "as a matter of reasonable deference to state jurisdiction, should have declined to accept Federal jurisdiction." (Brief p. 38).

In the instant case no purpose would have been served if the district court had "deferred" to state jurisdiction. *Hillsborough Township* v. *Cromwell*, 326 U.S. 620 (1946). So far as the Lord's Day Act applies to the Crown Kosher Market, the Massachusetts courts have authoritatively construed the Act to mean that it may not open on Sunday. The latest of these cases is *Commonwealth* v. *Chernack*, 336 Mass. 384 (1957), involving the manager of the corporate plaintiff.[10] No further determination of local law is needed as in *Harrison* v. *N.A.A.C.P.* 360 U.S. 167 (1959), nor are plaintiffs first required to seek remedies in the state courts. *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Baron* v. *O'Sullivan*, 258 F.2d 336, 337 (C.C.A. 3, 1958); *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U.S. 196, (1924); *Carson* v. *Warlick*, 238 F.2d 724 (C.C.A. 4, 1956), cert. denied 353 U.S. 910 (1957). The only question left for the state court

[10] Prior decisions construing the Lord's Day Act to forbid the opening of a shop by a seventh day Sabbath observer were: *Commonwealth* v. *Has*, 122 Mass. 40 (1877); *Commonwealth* v. *Starr*, 144 Mass. 359 (1887); and *Commonwealth* v. *Kirshen*, 194 Mass. 151 (1907).

to decide is that of federal constitutionality. In such a case the doctrine of abstention is wholly inapplicable. *Browder v. Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U.S. 903 (1956); *Sterling Drug* v. *Anderson*, 127 F. Supp. 511. (E.D. Tenn. 1954).

Those cases which seem to suggest that the district court should not exercise its equitable jurisdiction to restrain enforcement of state statutes usually contain elements of anticipating state construction, or of interference in criminal prosecutions already in process, or of little or no damage to the parties in awaiting state action. None of these conditions is present in the instant case. *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943); *Stefanelli* v. *Minard*, 342 U.S. 117 (1951); *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935).

On the other hand, where substantial property damage is inflicted by enforcement of the statute, or where multiple prosecutions of the complainant are threatened, federal courts do not hesitate to exercise their equitable jurisdiction. *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Doud* v. *Hodge*, 146 F. Supp. 887, (N. D. Ill. 1956), aff'd sub. nom. *Morgy* v. *Doud*, 354 U.S. 457 (1957); *Toomer* v. *Witsell*, 334 U.S. 385 (1948); See *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 179 (1959); cf. *Beal* v. *Missouri Pacific R. Corp.*, 312 U.S. 45 (1941); compare *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 96 (1935).

And finally the federal courts are increasingly finding it their duty to act where basic civil or constitutional rights are involved. *Evers* v. *Dwyer*, 358 U.S. 202 (1958); *Gayle* v. *Browder*, 352 U.S. 903 (1956), affirming 142 F. Supp. 707 (M. D. Ala. 1956); *Morrison* v. *Davis*, 252 F.2d 102 (C.C.A. 5, 1958), cert. denied 356 U.S. 968 (1958). All of these positive elements are present in the instant case.

It is therefore submitted that the court below was fully justified in exercising its equitable jurisdiction.

B. *The Lord's Day Act Is A Law Respecting An Establishment Of Religion Or Prohibiting The Free Exercise Thereof.*

1. It Is an Act to Enforce the Observance of Sunday as the Sabbath.

a. The Act In The Massachusetts Legislature

It is universally agreed that the Massachusetts Lord's Day Act had the original purpose of setting aside Sunday for the observance of the Sabbath by the dominant Christian sect. As will be seen, the decisions of the Massachusetts Supreme Judicial Court have repeatedly emphasized this fact. All of the judges on the three judge district court agreed in the instant case that the Massachusetts Lord's day statute was enacted for a religious purpose.[11] They differed apparently only on the question as to whether the Act today had acquired a different purpose.

It is significant that all of the intervenors below were religious organizations.

It is the claim of the appellants, however, that in some way and at some time this admittedly religious statute was converted into a mere civil regulation to provide a "day of rest." An examination of the Act itself, however, indicates that no such change occurred.

The multitude of amendments to the Act show a softening of the rigor of the original, but do not evidence any intent to establish a "day of rest." The contrary is true. Each of the many exceptions permits a new pursuit on Sunday. The effect of these amendments is to increase very sub-

[11] At the hearing below, even the dissenting judge revealed his feelings that the Act still had a religious purpose. See his remarks about believing in the Christian religion and giving it full faith and credit (R. p. 76) and his suggestion that Jews might go to the Synagogue on Sunday. (R. pp. 68-69).

sentially the number of activities which now may be maintained seven days in the week instead of only six. In fact some of the trade now permitted on Sunday may be carried on only upon the express condition that it is also followed during the other days of the week. For example, paragraph 2 of Section 6 permits the retail sale of tobacco by newsdealers "whose stores are open for the sale of newspapers every day in the week." Section 7 pertains to the granting of a license "to any reputable person who on secular days is a retail dealer in frozen desserts, etc." Section 6, 4th paragraph, permits bakers at certain hours on Sunday to sell "bread or other food usually dealt in by them."

This continuous process of activating the modern Sunday for secular pursuits does not constitute proof that the Massachusetts legislature changed the historical purpose of the Act so as to provide a universal "day of rest."

Far from evincing a desire on the part of the legislature to change the purpose of the Act from one to safeguard observance of the Sabbath, the Act itself and its amendments indicate the concern of the legislature to preserve the original purpose.

For instance:

1. In Massachusetts General Laws (Ter. Ed.) the Act is entitled "Observance of the Lord's Day". Provisions regulating hours and days of labor are contained in Mass. G.L. (Ter. Ed.) c. 149, entitled "Labor and Industries". When the Massachusetts Legislature intended to establish a day of rest, it said so clearly in c. 149, Sec. 48, providing for "at least 24 consecutive hours of rest, which shall include an unbroken period comprising the hours of eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days".

2. Sec. 3 of c. 136 (last amendment 1955) and Sec. 4 of c. 136 (last amendment 1956) both refer to public entertainments or licenses therefor on the Lord's day "in keeping with the character of the day and not inconsistent with its due observance". If the Lord's Day Act is merely a civil regulation setting apart a "day of rest", what is meant by "the character of the day" or "its due observance"?

3. The word "secular" appears frequently throughout the Act to contrast the Lord's day with the other days of the week.[12] Reference has already been made to some of the places where the word is used. There are, however, other paragraphs where the word "secular" appears, such as Sec. 6, 5th paragraph, which refers to "secular business and labor", and the older Sec. 12 (last amendment 1864), which provides a punishment for anyone who on the Lord's day permits persons on their premises to spend "their time idly or at play or in doing any secular business . . . ." (Apparently this section proscribes resting).

The popular meaning of the word "secular" as the antithesis of the word "religious" or "ecclesiastical", is confirmed by Webster's New International Dictionary Second Edition 1957, which defines the word "secular" in specific senses as follows:

> "(a) belonging to the state as distinguished from the church; (b) non-ecclesiastical; civil; (c) not religious in character nor devoted to religious ends or uses; not sacred; profane."

[12] The same distinction is made in Massachusetts decisions dealing with the Lord's Day Act. See *Brattle Films, Inc.* v. *Commr. of Public Safety*, 333 Mass. 58, 61 (1955).

4. Certain sections of the Act are especially devoted to maintaining the Lord's day as the Sabbath.

For instance, Section 10 permits certain parades on the Lord's day to various organizations for specific commemorative purposes, but provides that the music must be suspended within 200 feet of any place of public worship (1931).

Section 11 permits policemen and firemen to parade on certain special Sundays but the music must be suspended within 200 feet of any place of public worship (1931).

Section 22 (last amendment 1928) and Section 27 (last amendment 1931) forbid the issuance of licenses for sports or games "within 1,000 feet of any regular place of worship."

The foregoing sections indicate clearly a purpose to protect Sunday church worship. Nowhere in the General Laws, however, is such protection afforded to other sects and religions which conduct Sabbath day services on any other day of the week.

5. The same solicitude for Sunday worship is exhibited in the hours during which the new Sunday activities may be conducted. The time is carefully allotted to avoid the usual hours of Sunday morning church services. For instance:

a. Substantially all recreational activities may not begin until after 1:00 P.M. on Sundays. These include:

Outdoor lawn bowling, golf driving ranges, etc. Section 2 (last amendment 1956).

Licensed entertainments, etc. Section 4 (last amendment 1957).

Amusement parks and beaches. Section 4A (last amendment 1946).

Licenses to operate bowling alleys. Section 4B (last amendment 1946).

Private industrial trade expositions. Section 6, 8th paragraph, (last amendment 1957).

Participation in or witnessing athletic sports or games. Section 21 (last amendment 1954).

b. Many of the exceptions contained in Section 6 also carefully protect the church hours. Among these are the following:

Retail sale of bread before 10:00 A.M. and between 4:00 P.M. and 6:30 P.M. (2nd paragraph).

Transportation of general commodities by motor truck or trailer before 8:00 A.M. and after 8:00 P.M. (4th paragraph).

Transportation of petroleum products by motor truck or trailers before 6:00 A.M. and after 10:00 P.M. (4th paragraph).

Selling of bakery products by bakers before 10:00 A.M. and between 4:00 P.M. and 6:30 P.M. (4th paragraph).

Sale of kosher meat by observers of the seventh day as the Sabbath, between 6:00 A.M. and 10:00 A.M. (4th paragraph).

Business of bootblack before 11:00 A.M. (5th paragraph).

No other provisions of the General Laws protect from such secular activities the hours of worship by persons who observe the Sabbath on some day other than Sunday. It is impossible to make a rational reconciliation between the foregoing provisions and the "day of rest" theory. The rumbling of trailer trucks through the streets before 6:00

o'clock in the morning is hardly conducive to Sunday morning rest. The operation of bakery shops before 10:00 A.M. forces activities during the morning rest hours. If a kosher meat shop opened at 6:00 A.M. on Sunday and had any patronage at that hour, this would not add to the "rest" of the neighborhood. And one may ask why a kosher meat shop disturbs a day of rest after 10:00 A.M. but not before that hour. Just why a bootblack may operate until 11:00 A.M. is hard to fathom except possibly to take care of customers who want their shoes shined before going to church.

The history of the Lord's Day Act in the Massachusetts legislature is therefore marked by:

(a) A total absence of any evidence that its original purpose was changed; and
(b) positive amendatory provisions to protect the religious observance of Sunday as the Sabbath; and
(c) positive amendatory provisions that contradict the "day of rest" theory by permitting more and more secular work and activities on Sunday.

b. The Act In The Courts Of Massachusetts

From the earliest to modern times the decisions of the Massachusetts Supreme Judicial Court have viewed the Lord's Day Act as primarily a statute "to enforce the observance of the day (the Sunday Sabbath) by penal legislation". *Davis v. City of Somerville*, 128 Mass. 594, 596 (1880).

The only departure in this stream of judicial opinion occurred in 1877 when a Seventh Day Adventist charged with opening a shop on the Lord's day raised the issue of unconstitutionality by claiming that the Act was in derogation of the Eleventh Amendment to the Constitution of the Commonwealth, which provided that "No sub-

ordination of one sect or denomination to another shall ever be established by law". It was the opinion in this case, *Commonwealth* v. *Has*, 122 Mass. 40 (1877) which, without any analysis of the statute or evidence, or reference to previous opinions, suddenly characterized the Lord's Day Act as "essentially a civil regulation, providing for a fixed day of rest . . .".

As will be seen, the Massachusetts Supreme Judicial Court paid no further attention to this characterization except merely to refer to the authority of *Commonwealth* v. *Has* in one subsequent case where the defendant pleaded that he observed the seventh day as the Sabbath. This case and *Commonwealth* v. *Has* will be considered later.

The appellants base their claim that the Lord's Day Act is constitutional upon the characterization of the statute made in *Commonwealth* v. *Has*. Even if the federal courts ar not bound to accept a state court's characterization of local legislation but may look at the actual purpose of the Act[13] as expressed therein, *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955); *Coppage* v. *Kansas*, 236 U.S. 1, 15-16 (1914), the views of a state court concerning the purpose of legislation are entitled to respectful consideration.

In the instant case, the district court studied the history and provisions of the statute and the opinions of the Massachusetts Supreme Judicial Court concerning the purpose of the Lord's Day Act. It came to the conclusion that:

> "The characterization of the Sunday law as being merely a civil regulation providing for a 'day of rest'

[13] Appellants' brief seems to confuse characterization with construction or interpretation of the Act. The district court fully accepted the state court's construction of the meaning of the Lord's Day Act.

> seems to have been an *ad hoc* improvisation in *Commonwealth* v. *Has*, supra, because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state constitution if the religious motivation of the statute were more explicitly avowed." (R. p. 142).

It is submitted that this conclusion by the district court was amply justified. For the purpose of bringing this out clearly, appellees' brief will consider rather extensively the Massachusetts cases dealing with the Lord's Day Act. This may be helpful in bringing out the unique position of the opinion in *Commonwealth* v. *Has* in the line of Massachusetts decisions.

The cases are divided into two groups, those not involving Seventh Day Sabbath observers and those in which constitutionality was pleaded by Sabbatarian defendants.

(1) *Cases Not Involving Seventh Day Sabbath Observers.*

One of the early decisions is *Pearce* v. *Atwood*, 13 Mass. (13 Tyng) 324 (1816). This case held that the Lord's day statute did not authorize a Justice of the Peace to arrest a traveler on the Lord's day. In a long decision considering the Act, the court says at page 348:

> "It would certainly seem extraordinary, that a statute, enacted for the sole object of insuring reverence and respect for one day of the week, in order that religious exercises should be performed without interruption from common and secular employments should authorize acts which, from their necessary publicity, would be likely to cause more disturbance to devout people than all the irregularities intended to be cured."

And on Page 345, there is an interesting discussion of the Jewish Sabbath versus the Christian Sabbath. In the course of the discussion, the court says:

> "It is true, from the fourth command in the Decalogue it may be inferred, that one day in seven was, according to the divine will, to be set apart as a day of rest from labor. But none will contend, that the day therein sanctified is the day which Christians are bound to keep as holy time; or that any of the rigid laws of *Moses* relative to the observance of that day are now in force. It is enough to observe, that, by the universal consent of Christians, another holy day has been substituted . . .".

Bennett v. *Brooks*, 91 Mass. (9 Allen) 118 (1864), holds that a will may be validly executed on the Lord's day, but nevertheless quotes with approval the preamble to the Lord's day statute of 1791 c. 58:

> "Thoughtless and irreligious persons, not attentive to the duties and benefits of the Lord's Day, do profane the same by unnecessarily pursuing their worldly business and recreations on that Day, to this, our great damage, as members of a Christian society; . . .".

In *Jones* v. *Inhabitants of Andover*, 92 Mass. (10 Allen) 18 (1865), a suit to recover damages for injuries due to a defective way, the court refers to "the legality of the plaintiff's act in using the highway on the Sabbath".

In *Commonwealth* v. *Sampson*, 97 Mass. (1 Browne) 407 (1867), the decision holds that the gathering of sea-weed was not a work of necessity and characterizes the pro-

hibited act as a disturbance of the peace and quiet of the Lord's Day, and from its evil effect and example, . . ."

In *McGrath* v. *Merwin*, 112 Mass. 467 (1873), a suit to recover damages for gratuitously helping defendant to clear out a wheel pit on the Lord's day, the court differentiates the "Lord's day" from any "secular day".

In 1877, the opinion in *Commonwealth* v. *Has*, 122 Mass. 40, made its unsupported assertion that the Lord's Day Act was "essentially a civil regulation".

Three years after *Commonwealth* v. *Has*, the court, in *Davis* v. *City of Somerville*, 128 Mass. 594 (1880), dealing with a suit for damages due to a defective way by a plaintiff returning from a funeral on the Lord's day by an indirect route, ignored its opinion in *Commonwealth* v. *Has* and reverted to the original purpose of the Act in the following language, on page 596.

> "The statute making it unlawful and criminal to travel on the Lord's day, except from necessity or charity, has retained its place in our statute-book from the earliest times in the history of the state. Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time. Whatever inconveniences might result at the present day from the literal and general enforcement of the Lord's day act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the

same rules as would govern us in the interpretation of any other statute."

Commonwealth v. *Dextra*, 143 Mass. 28 (1886), presents a rather unusual use of precedent by the Massachusetts Supreme Judicial Court. In that case a barber who kept his shop open on Sunday claimed that barbering was a work of necessity and, therefore, within the exception provided for in Section 5. The court following *Commonwealth* v. *Has* held that the exception of works of necessity applied only to the offense of doing labor, and not to the separate offense of keeping open a shop.

However, in discussing the purpose of the Act, the court discarded *Commonwealth* v. *Has* and on page 31 expressly ruled that the purpose of the Act was as originally intended:

> "The Legislature intended by this statute to keep the ordinary places of traffic, business and work closed on this day, so that those persons who desired to relax from labor and business, and attend to private and public worship, might not be disturbed by persons pursuing their worldly business and avocations in open shop. This statute is substantially the same as that enacted in 1791, c. 58. The preamble to the latter statute sets forth at length the reasons for its passage, and is applicable to the statute now in force, as well as to the several laws enacted upon this subject since that time."

The preamble referred to in the above quotation as still applicable is quoted in *Commonwealth* v. *White*, 190 Mass. 578 (1906).

This case, decided twenty-nine years after *Commonwealth* v. *Has*, discusses the purpose and history of the

Lord's Day Act at considerable length. The case involved the question of whether the picking of cranberries on Sunday, when delay might endanger the crop, was a "work of necessity". The opinion contains no reference to *Commonwealth* v. *Has* or to its assertion that the Lord's Day Act was a mere "civil regulation". Instead, in unmistakable language, the court made it clear that the purpose of the statute was religious. The following, beginning on page 580 of the opinion in *Commonwealth* v. *White*, was quoted in the majority opinion in the instant case but is worth repeating. The paragraphing of the quotation is our own and not from the original opinion:

> "In construing this statute it is to be borne in mind that so far as material to the question before us, it is simply the continuation of a law which from a very early time in the history of the Colony has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance are set forth in the various preambles to those statutes. One of these is in the following language:
>
> > 'Whereas it is the duty of all persons, upon the Lord's Day, carefully to apply themselves, publickly and privately, to religion and piety, the prophanation of the Lord's Day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons; therefore,' etc. See Prov. St. 1760-61, c. 20 § 1; 4 Prov. Laws, (State ed.) 415.

Perhaps the most instructive preamble is that which precedes St. 1791, c. 58, which was the first general statute passed on this subject after the adoption of our State Constitution.[14] It reads as follows:

> 'Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society; to the great disturbance of well disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life: Be it therefore enacted,' etc.

Such was the idea of the Lord's day for the observance of which this system was devised."

Forty-six years after the decision in *Commonwealth* v. *Has*, the court again emphasized the religious character of the Lord's Day Act. In three separate cases under the first title of *Commonwealth* v. *McCarthy*, 244 Mass. 484 (1923), the court considered the legality of the transporta-

[14] This "most instructive preamble" is the one referred to in *Commonwealth* v. *Dextra*, supra.

tion and delivery on Sunday of bread by the bakers to their customers who were licensed victuallers. G. L. c. 136, Section 6, permitted the *making* and *selling* by bakers, or their employees, on the Lord's day before 10 o'clock in the morning and between the hours of 4:00 and 6:30 o'clock in the afternoon, of bread or other food usually dealt in by them. Two of the defendants *delivered* their bread to their regular customers within the designated hours. There was no other way by which their customers, common victuallers, could secure the bread except by its delivery to them. Nevertheless, the defendant's exceptions were overruled and the court ordered judgment to be entered on the verdict of guilty in each case.

The opinion of the court on Page 486 contained the following language:

> "The delivery of bread outside the premises of the baker on the Lord's day is not a work of necessity within the meaning of the Lord's day statute. The statute prohibiting the performance of labor, business or work, except works of necessity and charity, on Sunday, was enacted to secure respect and reverence for the Lord's day."

The opinion then cites with approval the language previously quoted (p. 35) from *Davis* v. *City of Somerville*, 128 Mass. 594 (1880).

(2) *Cases Involving Seventh Day Sabbath Observers.*

We have seen that the Massachusetts Supreme Judicial Court has from earliest to modern times characterized the Lord's Day Act as setting up a religious Sabbath. When, however, the defendant pleaded in defense that he observed Saturday as the Sabbath, the court ignored its own

characterization and held that the Lord's day statute merely set aside a rest period.

However, the court did not immediately make this switch. *Commonwealth* v. *Hyneman*, 101 Mass. 30, 31 (1869), was a prosecution of a licensed victualler for selling liquor on the Lord's day. The defendant offered to "prove that he was a Jew, conscientiously believing that the seventh day was the Sabbath. *His conscientious belief might protect him from a prosecution for violating the provisions of the Gen. Sts. c.84, by acts of secular labor on the Lord's day* (see § 9, provided he violated no other law." * (Gen. Sts. c.84, sec. 9 is now G.L. c.136, sec. 6). "But it is no excuse for his violation of the law respecting the sale of intoxicating liquors."

The next case was *Commonwealth* v. *Has*, 122 Mass. 40 (1877), previously mentioned.

This was on a complaint that the defendant unlawfully kept open his shop on the Lord's day.[15] The defendant testified that he conscientiously believed the seventh day ought to be observed as the Sabbath, that he observed it and disturbed no one. He also raised the question of constitutionality under the Massachusetts Constitution.

In its opinion the court rejected both defenses. As to the first, the opinion ruled that keeping open a shop was a different offense from "performing of secular business or labor on the Lord's Day" and that, therefore, the conscientious belief in and observance of the seventh day as the Sabbath was not a defense.

The court then proceeded to dispose of the defense that the Act as to the defendant subordinated his sect (Seventh

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* Emphasis supplied.

[15] The complaint charged Gehring Has, the defendant, with keeping open his shop on the Lord's day, "to the great scandal of religion, against good morals and good manners, and against the peace of said Commonwealth and the form of the Statute made and provided".

Day Adventist) to the domination of the other Christian sects. It was this defense which evoked the characterization that the Lord's Day Act was "essentially a civil regulation", in the following language:

> "It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement; some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community." (p. 42).

As we have seen, this view of the Lord's Day Act is a departure from previous and subsequent decisions by the Massachusetts Supreme Judicial Court.

The next case in which a Sabbath day observer pleaded the unconstitutionality of the Lord's Day Act in defense to a prosecution for violation was *Commonwealth* v.

Chernock, 336 Mass. 384 (1957). The defendant was the manager of the corporate plaintiff in the instant case. The defendant pleaded that the market was closed on Saturday because of his religious convictions and that the enforcement of G.L. (Ter. Ed.) c. 136 because the shop was open on Sunday was a violation of his religious rights under the Constitution of Massachusetts. The court disposed of this defense in one sentence, at p. 386:

> "That the rights of the defendant to religious liberty and equality . . . under the Constitution of this Commonwealth are not violated by the enforcement of the instant statute is settled. *Commonwealth* v. *Has*, 122 Mass. 40, 42." [16]

From the foregoing, it will be seen that the characterization of the Lord's Day Act as merely a "civil regulation" to establish a "fixed period of rest" occurs in only one decision of the Massachusetts Supreme Judicial Court namely, *Commonwealth* v. *Has*. The opinion in *Commonwealth* v. *Chernock* simply rests its decision on the former case without discussion.

Since the opinion in *Commonwealth* v. *Has* was at variance with the entire course of judicial opinion in Massachusetts concerning the purpose of the Lord's Day Act and has no firmer basis than an unsupported out-of-hand assumption, the majority opinion of the district court was fully justified in its finding that the primary purpose of the Lord's Day Act was to enforce the observance of Sunday as the Sabbath.

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[16] In two additional cases the defendant pleaded, in defense that he conscientiously observed Saturday as the Sabbath. However, the constitutional question was not raised in either case and the opinions did not discuss the purpose of the Lord's Day Act. These cases were: *Commonwealth* v. *Starr*, 144 Mass. 359 (1887); and *Commonwealth* v. *Kirshen*, 194 Mass. 151 (1907).

2. As A Law To Enforce The Observance Of Sunday As The Sabbath, Mass. G.L. c. 136 Is Unconstitutional.

The plaintiffs in this case conscientiously believe that Saturday is the true Sabbath. Apart from the Lord's Day Act, they are already under tremendous social and economic pressure to abandon this tenet of their faith and to conform to the pattern of the majority religions. For this the state is not responsible,—it is the unescapable burden of a minority.

However, the Commonwealth of Massachusetts is using the machinery of its criminal law to compel the plaintiffs to observe a second Sabbath, not their own.

The Act confronts the plaintiffs with a dilemma, either horn of which inflicts injury upon them:

a. If the plaintiffs abstain from secular transactions on their Sabbath, then the corporate plaintiff will be open to its customers approximately only four and one-half days a week, thereby suffering a disastrous penalty because of the religion of its owners; its Orthodox (and many Conservative) customers will be unable to purchase food sanctioned by their religion (or any other food) from Friday afternoon until Monday of each week; the task of the Rabbis in supervising the condition of kosher meat, usually delivered on Thursday or Friday, will be greatly complicated because it would have to be kept until Monday. (R. pp. 122-123).

b. If the plaintiffs engage in secular business on Friday night and Saturday, the corporate plaintiff will have surrendered its character as a market for Orthodox Jews, its stockholders, also Orthodox, will have violated Jewish law, its Jewish customers will have abandoned their Sabbath day observance, and

> the Rabbis will have lost control over the religious practices of the members of their congregations.

In either case, the free choice of religion by seventh-day Sabbath observers is seriously hampered by the Lord's Day Act.

The state thus is invading the field of religion with its most potent force, the criminal law. The use of penal sanctions by a controlling sect against dissenters was the bitter historical experience which led the founders of our Republic to formulate the clause in the First Amendment pertaining to religion. The Act is clearly:

> "a law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

It would seem needless for appellees' brief to cite to this Court its own language concerning the meaning of the above words. In a series of truly great decisions, in majority and minority opinions, they have been given judicial construction commensurate with a basic constitutional principle. The most quoted definition is in *Everson* v. *Board of Education*, 330 U.S. 1, 15-16, (1947), cited in the majority opinion below, (R. pp. 144-145) and in a number of the briefs. In *Illinois ex rel McCollum* v. *Board of Education*, 333 U.S. 203 (1948), they received further interpretion as a "spacious concept" with a "secular reach far more penetrating in the conduct of government than merely to forbid an established church." Additional definitions are found in the majority opinion and dissents in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Under the principles enunciated by this Court, the Supreme Court of New Jersey, in *Tudor* v. *Board of Education*, 14 N.J. 31, 100 A. 2d 857 (1953), interpreted and applied the Amendment to for-

bid the distribution of a Protestant sponsored Bible to public school pupils.

The Lord's Day Act by enforcing observance of Sunday as the Sabbath is a law which aids one religion or prefers one religion over another, or that, through severe economic pressure and serious inconvenience, influences those who believe in the seventh day Sabbath to observe the Sabbath of another religion.

The New York Court of Appeals has expressly stated that the Sunday law of that state could not be sustained on religious grounds, *People* v. *C. Klinck Packing Co.*, 214 N.Y. 121, 108 N.E. 278 (1915). The Massachusetts Supreme Judicial Court has implicitly admitted that the Lord's Day Act, if a religious statute, would be unconstitutional, by suddenly—and temporarily—dropping its own view that the purpose of the act is to enforce observance of the Sabbath when a defendant challenged its constitutionality.

There are only three opinions of the United States Supreme Court which discuss Sunday closing laws. In *Soon Hing* v. *Crowley*, 113 U.S. 703 (1885), the Sunday closing (of laundries) was not involved although the opinion indicated it would have been valid. *Hennington* v. *Georgia*, 163 U.S. 299 (1896), merely raised the question as to whether the Sunday law conflicted with the Commerce clause of the Constitution. *Petit* v. *Minnesota*, 177 U.S. 164 (1900), did not involve a seventh day Sabbath observer. All three cases are quite old and were decided before it was held that the Fourteenth Amendment made the prohibitions of the First Amendment applicable to state statutes. All of them are almost completely bare of the considerations before this Court in the instant case.

The one case involving a seventh day Sabbath observer was *Friedman* v. *New York*, 341 U.S. 907 (1951). Friedman, a retailer of kosher meat, was convicted of opening his store on Sunday, appealed to the New York Court of

Appeals, *New York* v. *Friedman*, 302 N.Y. 75, 96 N.E.2d 184 (1950), and then appealed to this Court on constitutional grounds. His appeal was dismissed per curiam without opinion for want of a substantial federal question. We do not know why the Court came to this conclusion. However, the record does not indicate that the New York law is a religious statute. Nor is it clear that there was serious financial loss to the defendant because of the statute. Unlike the instant case, there was no showing of the unique importance of the store to the Jewish community, of the hardship on customers because of inability to supply dietary needs, or of interference with Orthodox Rabbis in the performance of their functions. Nor was any stress laid upon the pressure which the State of New York was bringing upon Jews, through its Sunday statute, to abandon their own observance of their Sabbath on Saturday. In the instant case the religious character of the Lord's Day Act and the hardship which it imposes on seventh day Sabbath observers are both firmly established.

3. If Sunday Was Selected Primarily as "A Day of Rest" Because Already Observed as a Day of "Peculiar Sanctity" by the Great Majority, It Would Be Violative of Plaintiffs' Rights Under the First Amendment.

The opinion in *Commonwealth* v. *Has*, after stating that the Act is "essentially a civil regulation" to create "a fixed period of rest", goes on to explain that Sunday was selected as the day because the "great majority celebrate it as a day of peculiar sanctity". If this were the fact, then the law manifestly favors the followers of the majority Christian faiths and penalizes the minority who conscientiously observe their own Sabbath on Saturday. According to this exposition of the assumed purpose of the Lord's Day Act, the Massachusetts Legislature:

> Chose Sunday because this would not interfere with the liberty of members of the dominant Christian faiths since they already observed Sunday as the Sabbath;
>
> Compelled Saturday Sabbath observers to abstain from secular pursuits on a second day, thus reducing to five, and even four and a half days, the weekly time available to them for secular work and business.

The discrimination involved in this situation has been recognized by a number of states, which have expressly exempted seventh day Sabbath observers from the operation of their Sunday laws. The courts in some of these states have ruled that the law would be unconstitutional without such exemption. *Johns* v. *State*, 78 Indiana 332 (1881); *People* v. *Bellet*, 99 Mich. 151, 57 N.W. 1094 (1894); *Krieger* v. *State*, 12 Okla. Cr. 566, 160 Pac. 36 (1916); *Cohen* v. *Webb*, 175 Ky. 1, 192 S.W. 828 (1917). See also *Cincinnati* v. *Rice*, 15 Ohio 225 (1846), *Canton* v. *Nist*, 9 Ohio St. 439 (1859); *Kut* v. *Albers Super Markets*, 76 Ohio App. 51, 63 N.E.2d. 218 (1945).

The Massachusetts Lord's Day Act contains similar exempting language in the 5th paragraph of section 6:

> "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby."

However, when *Commonwealth* v. *Has* decided that the words "secular business and labor" did not include the opening of a shop, factory or warehouse, much of the substance of the exemption evaporated.

Appellees therefore submit that the Lord's Day Act is unconstitutional "as applied to the plaintiffs in this action, insofar as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday". (Judgment of the Court below, R. p. 176).

C. *The Lord's Day Act Constitutes A Deprivation Of Liberty And Property Without Due Process Of Law.*

It is familiar constitutional law that the state may not curtail the liberties of its citizens or deny them the use of their property unless such be justified as promoting the health, morals, safety or welfare of the community.

Assuming that the Lord's Day Act is merely a "civil regulation" to promote a "fixed period of rest", it should be noted that it is not a statute to provide a day of rest. Another statute, Mass. G.L. c. 149 has this purpose. The Lord's Day Act forces the entire population (subject to exceptions and exemptions) to "rest" on the same day in each week. The preliminary question, therefore, is whether it is within the police power of the state to provide not merely for one day of rest in seven, but for a fixed day to be universally observed.

Nowhere in the record of this case is there any factual background material to justify appellants' assertion that the welfare of the community requires all citizens to rest at the same time. There are speculations and arguments, but no data to support them.

Appellants' brief, Appendix B, lists five states as having repealed their Sunday laws, namely Arkansas, California, Iowa, North Carolina and Wisconsin. In these states, apparently, a general Sunday closing law is no longer deemed essential to the public welfare. Modern conditions and progressive labor legislation have rendered unnecessary

any welfare aspects of state enforcement of religious commandments.

However, even if we assume police power exists to enforce universal rest on the same day each week, the Lord's Day Act is not adapted to accomplish this result. "Unless there exists a reasonable relation between the character of the legislation and the policy to be subserved" *Society of Sisters* v. *Pierce*, 296 F. 928 (D. Ore. 1924), aff'd *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the statute is an unconstitutional deprivation of liberty and property without due process of law. In the *Opinion of the Justices*, 300 Mass. 615 (1938), the Massachusetts Supreme Judicial Court declared invalid a proposed ordinance to regulate the hours that barbershops might be open because it bore no reasonable relation to its stated purpose.

Appellants' brief relies upon *Commonwealth* v. *Has*, for an explanation of the purpose of the Lord's Day Act. This opinion asserts that the Act is to enforce rest from "ordinary avocations and the amusements of the community." However, the Act fails in these purposes.

The articles and services which may be sold on the Lord's day are numerous, and the hours when these transactions are permitted bear no relationship to the alleged "rest" which they are supposed to bring. On the contrary, the stated hours frequently indicate disturbance of rest rather than otherwise. Some of the permitted activities on the Lord's day are indicated in the footnote.[17]

So far as resting from "amusements" is concerned, the Lord's Day Act is replete with exceptions in favor of

[17] Tobacco may be sold by innholders, victuallers, druggists and newsdealers open every day of the week, Section 6, paragraph 2; bread before 10:00 A.M. and between 4:00 P.M. and 6:30 P.M., Section 6, paragraph 2; frozen desserts and mixes, Section 6, paragraph 2; soda water, Section 6, paragraph 2; confectionery, Section 6, paragraph 2; fruit, Section 6, paragraph 2; live bait, Section 6, paragraph 2; meals not consumed on the premises, Section 6, paragraph 3; gasoline, Sec-

sports and recreation.[18] The only limitations other than to obtain permits and to comply with regulations are that these amusements may not be maintained during the morning hours when people go to church, and that some of them may not be indulged in within a thousand feet of any regular place of worship.

The permitted activities seem to represent, for the most part, pursuits and businesses successfully demanded by pressure groups. Appellees submit that the continued prohibition against the opening of certain types of shops is merely a vestigial remainder of a comprehensive law, which, if ever related to "rest" purposes, has now become obsolete.

Appellants' brief contends, contrary to *Commonwealth*

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tion 6, paragraph 3; oil, Section 6, paragraph 3; motor accessories (vehicles, boats and aircraft), Section 6, paragraph 3; letting of horses, carriages, boats, motor vehicles, bicycles, Section 6, paragraph 3; letting of sports equipment on trains, Section 6, paragraph 3; printing, publishing, sale and delivery of newspapers, Section 6, paragraph 4; wholesale and retail delivery of milk and its transportation, Section 6, paragraph 4; transportation of general commodities (before 8:00 A.M. and after 8:00 P.M.), Section 6, paragraph 4; transportation of petroleum products (before 6 A.M. and after 10:00 P.M.) Section 6, paragraph 4; transportation of livestock, farm commodities and farm equipments for fairs, exhibitions, sporting events and veterinary purposes, Section 6, paragraph 4; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale, Section 6, paragraph 4; the making of butter and cheese, Section 6, paragraph 4; the making or selling by bakers or their employees of bread and other food usually dealt in by them, Section 6, paragraph 4; the keeping open of a shop for the sale of Kosher meat (between 6:00 A.M. and 10:00 A.M.), Section 6, paragraph 4; business and labor by Saturday observers, Section 6, paragraph 5; the business of a bootblack, Section 6, paragraph 5; the digging of clams, Section 6, paragraph 5; icing and dressing of fish, Section 6, paragraph 5; the sale of catalogues of pictures and other works of art, Section 6, paragraph 6; preparation for and conducting private industrial trade expositions, Section 6, paragraph 8; the sale of fruits and vegetables by the person who raised the same or by his agent on premises owned or leased by him, Section 6, paragraph 9.

[18] For instance, Section 2 permits tennis, golf and driving on miniature golf courses. Section 4 permits public entertainments including

v. *Has*, that one of the purposes of the Act is to provide a universal day of recreation. This suggestion that police power may be used to enforce recreation sharpens even further the issue concerning the right of the state to curtail the liberty of its citizens, especially those guaranteed under the First Amendment.

When First Amendments rights are involved, the courts are astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs concerning matters of public convenience are insufficient to justify the diminishing of the exercise of rights vital to the maintenance of democratic institutions. *Schneider* v. *Irvington*, 308 U.S. 159, 161 (1939). The interference with First Amendment rights should be weighed against the alleged public benefits. The evil must be extremely serious and the degree of imminence extremely high before such abridgements will be sustained. *Cf. Pennekamp* v. *Florida*, 328 U.S. 331 (1946).

This test of constitutionality has found expression in this Court in cases holding that the rights guaranteed by the First Amendment hold a preferred position among constitutional rights. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943); *Thomas* v. *Collins*, 323 U.S. 516 (1945).

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musical entertainment by mechanical or electrical means, radio and television in public dining rooms, and the operation of motion pictures. Section 4A permits the maintenance and operation upon the Lord's day of amusement parks and beach resorts, including the right to operate bowling alleys, shooting galleries, photographic galleries, games and "such amusement devices as may lawfully be operated therein on secular days." Section 6 permits private industrial trade expositions. Section 17 permits fishing by licensed fishermen if not for commercial purposes. Section 21 permits athletic sports or games specifically including baseball and basketball. Sections 22 and 27 permits sports and games on designated playgrounds. Section 25 permits outdoor exercises not involving the elements of contest. Section 26 permits participation in and witnessing of athletic sports and games in which the contestants do not receive any pecuniary reward.

However phrased, this Court has recognized that there must be a real danger to the public welfare to validate the substantial intrusion of the police power into the protections of the First Amendment. These cases cannot be disposed of by the mere claim that there is a "presumption" of validity to legislative enactments. While much respect is given to legislative determinations in the field of economics, legislative invasions in the areas of fundamental freedoms are far more carefully scrutinized. *Kovacs* v. *Cooper*, 336 U.S. 77, concurring opinion p. 95 (1949).

Here the interference with the liberty and property of the plaintiffs is substantial and severe. No urgent need of the public welfare justifies this situation. If the Crown Market remained open after 10 a.m. on Sunday it would hardly disturb the truncated "rest" or amusements of the community.

Moreover, the Lord's Day Act is not the kind of a statute which can be lightly referred to the legislature for a just amendment. It represents the wish of a majority religious group. Unlike laws which are merely foolish or illogical, this is not legislation which ordinarily brings its own cure through experience. As long as the same group remains in power, it usually is satisfied with its preferred status and is often bitterly resentful of efforts to change it. The normal political processes cannot be relied upon for amendment or repeal, cf. *United States* v. *Caroline Products Co.*, 304 U.S. 144, footnote 4 p. 152 (1938), and for this very reason the First Amendment was adopted.[19]

D. *The Lord's Day Act Denies To The Appellees The Equal Protection Of The Laws.*

Whether as a statute to enforce the observance of Sunday as the Lord's day or as a statute to promote a fixed

[19] See the discussion of legislation of this character in Appellants' Brief, *Braunfeld et al.* v. *Gibbons*, October Term 1960, No. 67.

day of rest, the Act denies to the appellees the equal protection of the laws.

By selecting Sunday, a day already observed as the Sabbath by the great majority, the Act accommodates them by making sure that they will not have to abstain from secular pursuits two days in the week. On the other hand, the appellees and others who observe the seventh day as the Sabbath are not so accommodated. If they are faithful to their own religious tenets, they are forced to abstain from secular pursuits two days a week instead of one. This solicitude for the convenience of the "great majority" of another faith and disregard for the harsh results inflicted on the appellees, clearly denies to the latter the equal protection of the laws. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

The Lord's Day Act also constitutes a denial to the corporate appellee of equal protection of the laws and the majority opinion of the district court so found. (See discussion in the opinion, and the footnotes at R. pp. 146-147).

The exemptions provided in Secs. 6 and 7 of c. 136 permit the sale on Sundays by others of many food stuffs and other products similar to those sold by the corporate appellee. For example, Secs. 6 and 7 of c. 136 permit certain persons to keep their places of business open on Sundays for the retail sale of frozen desserts, frozen mixes, confectionery, fruit, tobacco, milk, ice, bread and other food usually dealt in by bakers. In addition, Sec. 6 of c. 136 permits certain persons to keep their places of business open on Sunday for the wholesale sale of certain food stuffs, including poultry, bread, fruit and vegetables.

The result of the statutory exemptions is discrimination against the corporate appellee in that it compels the closing of its store while permitting other stores similarly situated to remain open for business on Sundays. There would seem to be no rational basis for such discrimination.

In fact, having in mind the alleged purpose of the Act, some of its results seem absurd. For instance, it may be debatable whether the sale of tobacco on Sunday (or any other day) is beneficial to the health and welfare of the community, but there can be no doubt that the purported "day of rest" is not furthered by permitting the sale of tobacco on Sunday to newsdealers only if they are open every other day in the week.

Other exemptions in c. 136 permit the sale of many items not commonly sold in stores like that of the corporate appellee. However, it is difficult to see how the sale of food products by the corporate appellee would interfere with the alleged purpose of the Act to an extent greater than the sale of such other articles.

Discriminations in the Lord's Day Act violate the Equal Protection Clause because they bear no reasonable relationship to the alleged purpose of the statute. cf. *Smith* v. *Cahoon*, 283 U.S. 553, 566-567 (1931).

State court cases involving Sunday laws frequently turn on particular statutes and ordinances. A case which closely resembles the instant case is *Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E. 2d 29 (1938) which was a prosecution for keeping open a grocery store on Sunday. The court there said:

> "If it be conceded that the general welfare is served by requiring one day of rest in each seven days, excepting only works of charity and necessity, the ordinance we are considering fails to attain this purpose. No reason is suggested and we can think of none why the shop of a dressmaker or milliner should be required to close while the cigar store remains open. None is apparent why a dry goods store should be required to close when a newsstand continues to operate. We do not see where the public welfare is served by closing the grocery store and allowing a confec-

tionery store to remain open, nor in closing a notions store while a drug store next door which sells notions is permitted to operate. Under this ordinance a bakery which sells bread must be closed but a shoe-shining shop which sells cigars and newspapers is unaffected. A motion picture theater with its mechanical acting and mechanical music may run, while a legitimate theater with human actors and musicians must refrain from operation. These distinctions appear to us to be entirely arbitrary, without relation to the public health, safety, morals or welfare." (p. 454)

To the same effect, see *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1937) and *Gronland* v. *Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948).

The foregoing cases involved statutes of general application. Other statutes and ordinances have been held invalid where they were specifically directed against certain types of stores. *Elliott* v. *State*, 29 Ariz. 389, 242 P. 340 (1926); *Arrigo* v. *Lincoln*, 154 Neb. 537, 48 N.W. 2d 643 (1951); *ex parte Hodges*, 65 Okla. Cr. 69, 83 P. 2d 201 (1938); *ex parte Ferguson*, 62 Okla. Cr. 145, 70 P. 2d 1094 (1937). See also, *Henderson* v. *Antonacci*, 62 So. 2d 5 (Fla. 1952); *City of Springfield* v. *Smith*, 322 Mo. 1129, 19 S.W. 2d 1 (1929).

Since the Lord's Day Act itself discloses that "Many classes of work which are excepted are surely no less destructive of public rest and relaxation than the opening of the Crown Market would be", (R. p. 147), the Act denies to the corporate appellee the equal protection of the laws.

IV.
Conclusion

For the foregoing reasons the appellees submit that the judgment of the district court should be affirmed.

HERBERT B. EHRMANN
SAMUEL MARKELL
RAYA S. DUBEN
50 Federal Street
Boston 10, Massachusetts

IRVING S. RIBICOFF
DAVID KOTKIN
64 Pearl Street
Hartford, Connecticut

SAMUEL L. FEIN
1421 Main Street
Springfield, Massachusetts
Counsel for Appellees

GOULSTON & STORRS
50 Federal Street
Boston, Massachusetts

RIBICOFF AND KOTKIN
64 Pearl Street
Hartford, Connecticut

FEIN, CAVANAUGH & KIMBALL
1421 Main Street
Springfield, Massachusetts
Of Counsel

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No. 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, et al., *Appellants,*

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Massachusetts

BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AMICUS CURIAE

WILLIAM D. DONNELLY,
1625 K Street, N. W.,
Washington 6, D. C.

BOARDMAN NOLAND,
208 Sherwood Building,
Spokane 1, Washington,

Attorneys for General Conference of Seventh-day Adventists

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Statement	1
I. The Denomination Opposes Sunday Laws	2
II. Seventh-day Adventists Have a Special Interest in Sunday Legislation	4
A. Belief in the Seventh-day Sabbath	5
B. Challenge to Unauthorized Attempt to Change Day	6
III. Real Issue Is a Question of Authority—Not Just Which Day	8
Argument	12
I. The Massachusetts and Pennsylvania Sunday Laws Are Invalid Because They Impose Restriction on Sunday Labor and Commercial Activity as a Religious Obligation	12
II. The Sunday Laws of Massachusetts and of Pennsylvania Are Invalid Because They Impose a Severe Economic Hardship and Missionary Handicap on Those Whose Religions Designate a Day Other Than Sunday for Religious Worship	13
A. The Sunday laws impose a choice of economic loss or abandonment of religious scruple	14
B. In proselyting activities, the Sunday laws prefer the Sunday-observing religions of the majority by freeing them of competition with the demands of commercial and other interests	17
C. By restricting recreational opportunities on that day, the Sunday laws of many States subject the Saturday Sabbatarian to discouragements of practice of his religion	18

Page

III. Free Exercise of Religion Is Protected Against Attacks Which, Though Indirect, Have Throttling Results Equal to Those of Frontal Assaults 19

IV. The Sunday Laws Violate the Minimal Guarantee of Equality of Treatment of All Religions and Complete Neutrality on the Part of the State 22

V. As Against First Amendment Rights, the Sunday Laws Can Be Sustained Only If the Subordinating Interest of the State Is Compelling 26

VI. The Interest of the State in Sunday Laws Is Not Compelling Because Reasonable Alternative Measures Are Open to Achieve the Same Objectives Without Violation of the Constitutional Rights of the Individual 30

A. General exemptions in the Sunday laws would remedy the evil at which they aim without harm to the right of religious freedom 33

B. One-day-rest-in-seven laws exemplify another reasonable alternative open to the States .. 36

VII. The Question Here Involved Has Never Been Considered in the Light of Present Circumstances and Giving Effect to the Legal Considerations Established by This Court as Pertinent 40

Conclusion 44

Appendix A 46

Appendix B 47

Appendix C 49

Appendix D 50

Appendix E 51

INDEX OF CITATIONS

CASES: Page

American Communications Assn. v. Douds, 339 U. S. 382 ..... 19, 20
Anonymous, 12 Abb. N.C. 455 36
Barenblatt v. United States, 360 U. S. 109 28
Bates v. Little Rock, 361 U. S. 516 ..... 20, 29, 44
Braunfeld v. Gibbons, No. 67 O.T. 1960 ..... 12, 22
Breard v. Alexandria, 341 U. S. 622 30
Cantwell v. Connecticut, 310 U. S. 296 (1940) 13, 14, 27, 28, 32
Carolina Amusement Co. v. Martin, 115 S. E. 2d 273 (S. C. 1960) 19
City of Shreveport v. Levy, 26 La. Ann. 671 36
Commonwealth v. Has, 122 Mass. 40 42
Commonwealth v. Hoover, 25 Pa. Super. Ct. 133 12
Davis v. Beason, 133 U. S. 333 ..... 5, 13
Davis v. Fish, 1 Greene 406 4
Dean Milk Co. v. Madison, 340 U. S. 349 30
Everson v. Board of Education, 330 U. S. 1 ..... 21, 23, 25, 28
Follett v. McCormick, 321 U. S. 573 ..... 17, 28
Frolickstein v. Mobile, 40 Ala. 725 42
Greenville Baseball, Inc. v. Bearden, 200 S. C. 363, 20 S. E. 2d 813 19
Greenville Enterprise, Inc. v. Jennings, 210 S. C. 163, 41 S. E. 2d 868 19
Grosjean v. American Press Co., 297 U. S. 233 21
Hennington v. Georgia, 163 U. S. 299 ..... 13, 43
Johnston v. The Commonwealth, 22 Pa. St. 102 4
Jones v. Opelika, 316 U. S. 584 ..... 27, 28
Jones v. Opeliha, 319 U. S. 103 27
Judefind v. State of Maryland, 78 Md. 510 18
Kislingbury v. City of Springfield, 10 N. J. Misc. 798, 160 A. 654 (Ct. Com. Pleas 1932) 36
Komen v. City of St. Louis, 316 Mo. 9 42
Kovacs v. Cooper, 336 U.S. 77 28
Kunz v. New York, 340 U. S. 290 33
Lovell v. Griffin, 303 U. S. 444 31
Marsh v. Alabama, 326 U. S. 501 28
Martin v. Struthers, 319 U. S. 141 ..... 28, 32
McCollum v. Board of Education, 333 U. S. 203 ..... 23, 25
Meyer v. Nebraska, 262 U. S. 390 30

	Page
Minersville School District v. Gobitis, 310 U. S. 586	29
Missouri, K. & T. R. Co. v. May, 194 U. S. 267	35
Murdock v. Pennsylvania, 319 U. S. 105	17, 22, 28
N.A.A.C.P. v. Alabama, 357 U. S. 449	20, 29, 44
Palko v. Connecticut, 302 U. S. 319	26
Pearce v. Atwood, 13 Mass. 324 (1816)	4
People v. Friedman, 302 N. Y. 75	43
People v. Ruggles, 8 Johns. 291, 5 Am. Dec. 335 (N. Y. 1811)	4
Petit v. Minnesota, 177 U. S. 164	13, 43
Pierce v. Society of Sisters, 268 U. S. 510	30
Prince v. Massachusetts, 321 U. S. 158	28
Re Berman, 344 Mich. 598	42
Rodman v. Robinson, 134 N. C. 503 (1904)	12
Saia v. New York, 334 U. S. 558	28, 32
Scales v. State, 47 Ark. 476	42
Schneider v. State, 308 U. S. 147	19, 30, 31
Specht v. Commonwealth, 8 Pa. St. 312	43
Speiser v. Randall, 357 U. S. 513	44
State of New Jersey v. Fass (Hudson County Ct.), 162 A. 2d 608 (1960)	16
Stockden v. The State, 18 Ark. 186	4
Sweezy v. New Hampshire, 354 U. S. 234	28
Terminiello v. Chicago, 337 U. S. 1	27
Terrett v. Taylor, 9 Cir. 42	24
Thomas v. Collins, 323 U. S. 516	11, 27, 28, 30
Thornhill v. Alabama, 310 U. S. 88	31
United States v. Ballard, 322 U. S. 78	5, 23
United States v. C.I.O., 335 U. S. 106	28
United States v. Lovett, 328 U. S. 303	35
Watkins v. United States, 354 U.S. 178	20
Watson v. Jones, 13 Wall. 679	4
West Virginia Board of Education v. Barnette, 319 U. S. 624	26, 27, 41, 43
Zorach v. Clauson, 343 U. S. 306	23, 25

STATUTES:

Ala. Code (1958) tit. 14, sec. 421	18
Arizona Rev. Stat. Ann. (1956) sec. 23-281	39
Arkansas Stat. Ann. (1947) § 41-3806	34

Page

California Labor Code, Div. 2, Part 2, c. 1:
Sec. 510 37
Sec. 550 38
Sec. 551 38
Sec. 552 38
Sec. 553 38
Sec. 554 38
Sec. 555 38
Sec. 556 39
Conn. Gen. Stat. (Supp. 1959):
Sec. 53-300 46
Sec. 53-303 34
Delaware Code Ann. (Supp. 1958) sec. 906(c) 46
Ga. Code Ann. (1935):
Sec. 26-6903 46
Sec. 26-6905 ..... 46, 47
Sec. 26-6908 46
Sec. 26-6910 46
Sec. 26-6914 46
Iowa Code Ann. sec. 729.1 33
Illinois Ann. Stat. ch. 38, sec. 549 34
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Sec. 44 34
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c. 136, sec. 6 34
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sec. 48 36
sec. 50A 37
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Page

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Sec. 2142 46
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Sec. 907 46
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Sec. 909 ..... 34, 47
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Sec. 9.76.020 34
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Page

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Luke 24:1 5
Mark 7:7, 8 6
Matthew 5:17, 18 6
Matthew 15:3, 9 6
Matthew 22:21 ..... 6, 10
Matthew 24:20 5
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 11

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, et al., *Appellants*,

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL., *Appellees*.

On Appeal from the United States District Court for the District of Massachusetts

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BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AMICUS CURIAE

STATEMENT

This brief amicus curiae is filed upon leave granted by both parties in letters, copies, of which have been filed with the Clerk. It is filed because of the vital interest of the Seventh-day Adventist denomination in the Sunday law question. As the largest Christian denomination in the nation observant of the Saturday Sabbath, the denomination and its members have long

suffered under the adverse effects, direct and indirect, religious, social, and economic, of Sunday closing laws in most of the states.

The Seventh-day Adventist denomination now numbers more than 330,000 adult members throughout the United States. Despite the difficulties and burdens imposed by Sunday laws, it has grown substantially in the 97 years since its organization when there were 3,500 members.

I. THE DENOMINATION OPPOSES SUNDAY LAWS.

Historically, the Seventh-day Adventist denomination has avoided litigation and contentions for and on behalf of its organization and members.

Its members are counseled that the duty to obey the laws of the state and nation includes obedience to Sunday closing laws, even though economic hardship may result. Members are instructed that rather than offend their Christian neighbors who believe in and observe Sunday as a sacred day, they should refrain even from such activities as mowing their lawns, doing the family washing, and other outdoor domestic work on Sunday. They are adjured not to conduct a business, or pursue secular employment which might be offensive to those who are worshiping in the immediate vicinity but rather to spend that time in missionary activities which are proper and acceptable on all days of the week.

By their forbearance, however, neither the denomination nor its members recognizes Sunday as a sacred day. On the contrary, they staunchly adhere to their position that Sunday laws are by their very nature, wording, motive, history, and enforcement, religious laws and thus unconstitutional.

Recitations in the preambles to Sunday laws and decisions of the courts proclaiming Sunday laws to be necessary for the health, welfare, and economy cannot change the embedded concept of the people that Sunday is thus observed, not from any considerations of health, but from religious conviction. Religious tradition of a majority of Christian churches attaches religious significance to the day and is the occasion for enactments such as those here involved. These basic actualities cannot be occluded by unreal claims of other purpose.

Irrebuttable evidence of the religious nature of the Sunday laws is found in their terminology. Verbiage such as "Lord's Day," "Sabbath Day," Christian Sabbath," "worldly employment," "secular business," "holy time," "Sabbath observance," "Sabbath breaking," "profanation of Lord's Day," "violate the Sabbath," and many other such words and phrases clearly indicate that religious inducements prompted the various legislators in framing and passing these laws.[1]

Aside from the transparency of the language in which these laws are framed, the position that such laws are religious laws is fortified by the manner in which these religiously worded statutes have been interpreted by the courts.

Before the Sunday law opponents successfully pointed out the unconstitutionality of legislation directed to observance of Sunday as a sacred religious day, many sagacious observations were made by judges in various states wherein Sunday law issues were being litigated.

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[1] See Appendix A, *infra*, p. 45.

Chief Justice Kent of New York said, "*The statute for preventing immorality* consecrates the first day of the week as holy time." *People* v. *Ruggles*, 8 Johns. 291. In the case of *Pearce* v. *Atwood*, 13 Mass. 324, 346, the Massachusetts court gave as the reason for setting aside the day as "holy" the fact that "the legislative power, or the uniform usage of every Christian state has exacted the observance of it as such." The courts of Iowa, Arkansas, Pennsylvania, and many others declare, that Sunday is "sacred."[2]

Therefore, though the Seventh-day Adventist denomination, as above set forth, does not encourage its members directly to challenge Sunday legislation, its declared policy as an organization and through its individual members is to remonstrate against Sunday legislation, and by all legitimate means to oppose every enactment that serves, in effect, to establish Sunday as a state-supported religious day.

II. SEVENTH-DAY ADVENTISTS HAVE A SPECIAL INTEREST IN SUNDAY LEGISLATION

The Seventh-day Adventist denomination shares with other Christian denominations many of the basic doctrines of the Christian religion and, in addition thereto, maintains doctrines peculiarly and intimately related to the issue which now is before this Honorable Court.

We appreciate, of course, that "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones*, 13 Wall. 679, 728. And, so far as this Court is concerned,

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[2] *Davis* v. *Fish*, 1 Greene 406, 412. *Johnston* v. *The Commonwealth*, 22 Pa. St. 102; *Stockden* v. *The State*, 18 Ark. 186.

the truth or error of our religious beliefs is not relevant and not a subject for adjudication. *Davis* v. *Beason,* 133 U.S. 333, 342; *United States* v. *Ballard,* 322 U.S. 78, 87. Nevertheless, appreciation by the Court of the deep concern of the Seventh-day Adventist denomination with the constitutionality of the Massachusetts Sunday Law justifies a brief resume of its beliefs relative to such laws.

A. Belief in the Seventh-Day Sabbath

As indicated by its name, the Seventh-day Adventist denomination adheres to the belief that the Bible teaches that the seventh day is the Sabbath. Their belief is based primarily on the wording of the fourth commandment of the Ten Commandments:

> "Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work; but the seventh day is the sabbath of the Lord thy God: in it thou shall not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the sabbath day, and hallowed it."

They believe that the seventh day is the only day that God has ordained and sanctified as a holy day. This doctrine is taught throughout both the Old and the New Testament.[3]

The Scriptural authority for the sanctity of the Seventh-day Sabbath and the lack of Scriptural authority for the change of the Sabbath are recognized

[3] Genesis 2:2, 3; Exodus 16:4, 26, 29; Exodus 20:8-11; Matthew 24:20; Luke 4:16; 23:52-56; 24:1.

by many Christians of both Catholic and Protestant faiths, as well as by the Jews.[4]

B. Challenge to Unauthorized Attempt to Change Day

The Seventh-day Adventist denomination was founded by a group of people intensely interested in Bible prophecies. In the Holy Scriptures they discovered evidence that indicated a wrongful attempt would be made to transfer the sanctity of the Seventh-day Sabbath to some other day. Certain passages of Scripture refer to an unauthorized attempt on the part of some power, contrary to the Commandment of God, to "change the times and the laws."[5] They believe that the "times" referred to is the weekly time of worship, or the Seventh-day Sabbath as defined in the Bible, and that the "laws" referred to are the Ten Commandments which are eternal, and which, among other things, enjoin all men to observe the Seventh-day Sabbath.[6]

The denomination believes that God has never authorized any person or body politic or ecclesiastical power to make such a change; that any person, church, or state which endeavors so to do is usurping God's power and authority.[7]

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[4] See Appendix B, *infra*, p. 46.

[5] Daniel 7:25 (Revised Standard Version). See Appendix C, *infra*, p. 47.

[6] Uriah Smith, *The Prophecies of Daniel and the Revelation*, rev. ed. (Pacific Press Publishing Association, Mountain View, Calif., 1944) pp. 105, 147; Ellen G. White, *The Great Controversy* (Pacific Press Publishing Association, Mountain View, Calif., 1950) pp. 443-450; *Bible Readings for the Home* (Review and Herald Publishing Association, Washington, D.C., 1958) pp. 357-367; 405-411; 432-441.

[7] Mark 7:7, 8; Matthew 15:3, 9; Matthew 5:17, 18; Isaiah 58:12-14; 2 Thessalonians 2:3-11; Daniel 7:25; Matthew 22:21.

Motivation for such unauthorized change has varied from time to time with people, places, and the immediate circumstances. In some instances, the early Christians celebrated Sunday in commemoration of the resurrection of Christ. Others were motivated by prejudice against the Jews and a determination to avoid all forms and ceremonies connected in any way with Judaism. Constantine's imperial edict for observance of Sunday was a mere adoption of the pagan day of worship in the hope thus to eliminate the divisive strain on the Empire occasioned by discordant religions.[8]

Gradually, over a period of centuries, the enforcement of civil Sunday legislation tended to promote Sunday observance throughout Christendom while at the same time increasing neglect of, and disregard for, observance of the Seventh-day Sabbath. As a conse-

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[8] See Philip Schaff, *History of the Christian Church* (Chas. Scribner's Sons, New York, 1916), vol. 3, c. 7, p. 380.
J. Westbury-Jones, *Roman and Christian Imperialism* (MacMillan and Co., Ltd., London, 1939), p. 210.
A. P. Stanley, *History of the Eastern Church* (Chas. Scribner's Sons, New York, 1884), p. 184.
Eusebius, Pamphili, *The Life of Constantine* in *Nicene and Post-Nicene Fathers*, book 2, c. 65, (Christian Literature Company, New York City, 1899-1900) p. 516.

"The festival of Sunday, like all other festivals, was always only a human ordinance, and it was far from the intentions of the apostles to establish a Divine command in this respect, far from them, and from the early apostolic church, to transfer the laws of the Sabbath to Sunday. Perhaps, at the end of the second century a false application of this kind had begun to take place; for men appeal, by that time to have considered labouring on Sunday as a sin." Neander, *History of the Christian Religion and Church*, tr. by Henry John Rose (James M. Campbell & Co., Philadelphia, 1843), p. 186.

quence, Sunday keeping became almost universal.[9] Inasmuch as the Roman Church was foremost in fostering and sanctioning civil Sunday legislation, responsible Roman Catholic spokesmen regard continuing acceptance of this change in days, even by most of the Protestant denominations, as both proof and acknowledgement of the authority of that church to command in regard to observance of holy days.[10]

III. REAL ISSUE IS A QUESTION OF AUTHORITY— —NOT JUST WHICH DAY

While which day the civil laws will enforce upon the citizens of the several states of the United States of America as a day to cease from their ordinary secular vocations is important to both Seventh-day Adventists and Jews, the Seventh-day Adventist denomination sees a more basic question in the Sunday law issue: Does any man or ecclesiastical authority have the right to change a divinely ordained law, thus setting himself up in the place of God?[11] The question to them becomes not merely which one of two twenty-four hour periods should they observe, but to whom do they owe allegiance: to God, who said, "Remember the Sabbath day [the seventh day of the week] to keep it

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[9] Vincent J. Kelly, *Forbidden Sunday and Feast-Day Occupations* (Catholic University of America Press, Washington, D. C., 1943), p. 1[illegible]

Lyman Coleman, *Ancient Christianity Exemplified*, c. 26, sec. 2 (Lippincott, Grambo & Co., Philadelphia, 1852).

James Augustus Hessey, *Sunday*, 4th ed. (Pott Young & Company, New York, 1880).

Peter Heylyn, *The History of the Sabbath*, 2d ed. rev. (Henry Seile, London, 1636).

[10] See Appendix D, *infra*, p. 48.

[11] 2 Thessalonians 2:3-4.

holy," or to men, who have said, "Remember the first day of the week to keep it holy"?

There is a conflict. Jews, Seventh-day Adventists, Seventh Day Baptists and others claim that God established the seventh day as the Sabbath by blessing it and hallowing it and by enshrining it in the heart of the great moral law, the Ten Commandments.

The Roman Catholic Church claims that by its vested authority it has transferred the solemnity of the seventh day to the first day. Unquestionably a great majority of Protestants also believe that Sunday is sacred.

Seventh-day Adventists believe that the final struggle for supremacy between the spiritual forces which now are in conflict will be waged over this question of authority.[12]

Whether the first day of the week or the seventh is the Sabbath is a religious question over which the state has no jurisdiction.

By Sunday law legislation the States lend their prestige and authority to those church interests that seek to impose Sunday observance upon the Christian world. Affirmance here of validity of such laws would strengthen the advocates of Sunday observance and materially increase the threat of such laws with increasingly stringent provisions and enforcement clauses, and revive the intolerance of Puritan days.

The Seventh-day Adventist denomination does not ask the Court to settle the question of which day is commanded by God to be kept; for, as has been noted, "The law knows no heresy, and is committed to the

[12] See Appendix E, *infra*, p. 49.

support of no dogma, the establishment of no sect." We insist only that the civil power is required to abstain from attempting to settle this religious question. We ask that the civil power recognize that two spheres of influence exist—that of God and that of the state. This basic principle of separation of church and state is comprehended in the words of Christ: "Render therefore unto Caesar the things that are Caesar's and unto God the things that are God's.[13] This basic principle requires for adherence to its philosophy that there be no interlocking of church and state by law or administration of law.

The civil government has the power and authority to protect the civil rights of men, their property, their life and their liberty, but in so doing it must not invade the jurisdiction of the spiritual, the right to believe or not to believe, the right to worship or not to worship. "Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." (Virginia "Declaration of Rights." Art. 16)

Each person should be left free to choose without influence of any degree from the state. The state should withhold its influence, either for or against any religious dispute. It cannot take sides for or against any religious organization or belief.

In maintaining the total and complete neutrality of the state as between religions, it is submitted that this Court must be vigilant to assert the unconstitutionality of any law which in the smallest degree tends to restrain the free exercise of religion.

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[13] Matthew 22:21.

> "* * * If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundation of liberty. (*Thomas* v. *Collins*, 323 U.S. 516)

It is because of these basic beliefs that the Seventh-day Adventist denomination has obtained from the parties permission to file this brief and respectfully solicits your consideration of the following legal arguments.

ARGUMENT

I. The Massachusetts and Pennsylvania Sunday Laws Are Invalid Because They Impose Restriction on Sunday Labor and Commercial Activity as a Religious Obligation.

The first Sunday law (Constantine's decree of March, 321 A.D.) was religious in character, based on the pagan conception that made religion a part of the state.[14] The English Reformation produced the statute which is the direct forebearer of many that taday are found in the statutes of the several states (29 Car. II, c. 7 (1676)). See *Rodman* v. *Robinson*, 134 N.C. 503, 511 (1904); *Commonwealth* v. *Hoover*, 25 Pa. Super. Ct. 133, 134.

Marked similarity is apparent, from even a casual reading of most of the laws in the colonies and many state courts early explicitly recognized that Sunday laws support, foster, and protect the Sunday-observing Christian religions.[15]

The briefs of the respondent in the instant case, and of the appellant in *Braunfeld* v. *Gibbons*, No. 67 O.T. 1960, make clear that even in the period of statehood, Sunday laws have been retained and enforced as a religious measure though judicially justified as health measures to insure one day's rest in seven. The spirit and purpose of the Sunday laws being to support and aid the Sunday-observing Christian religions, they violate the "establishment of religion" clause of the First Amendment.

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[14] R. L. Odom, Sunday in Roman Paganism (Review and Herald Publishing Association, Washington, D. C., 1944) pp. 173-192. Johnson and Yost, Separation of Church and State (University of Minnesota Press, 1948) pp. 219-220.

[15] Blakely, American State Papers on Freedom of Religion (3d ed., 1943), pp. 24-30, 33-36, 38-47. Johnson and Yost, *supra*, note 14, at pp. 223-231.

II. The Sunday Laws of Massachusetts and Pennsylvania Are Invalid Because They Impose a Severe Economic Hardship and Missionary Handicap on Those Whose Religions Designate a Day Other Than Sunday for Religious Worship.

Even if it be held that the Court may disregard the fact that observance of Sunday as a religious institution is the plain motive and purpose of the laws in question, the Sunday laws as applied here are nevertheless invalid because of their intrinsic purpose and effect in discouraging free exercise of religion by sects that observe the Saturday Sabbath.[16]

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In *Davis* v. *Beason*, 133 U.S. 333, this Court stated (p. 342):

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[16] Prior decisions of this Court are not controlling.—For two reasons, the decisions of this Court in *Hennington* v. *Georgia*, 163 U.S. 299 (1896), and in *Petit* v *Minnesota*, 177 U.S. 164 (1900) have neither controlling nor persuasive effect as precedents.

In the *Hennington* case, the challenge to the Georgia statute prohibiting the running of trains on Sunday relied solely on the interstate commerce clause. Whether the law was an establishment of religion was only of collateral interest in considering the reasonableness of the state action under the police power.

In the *Petit* case only the equal protection clause of the Fourteenth Amendment was invoked in attacking the discriminatory feature of the Sunday closing law which, by proviso specifically stated that keeping open a barber shop was not within the exempted works of necessity or charity.

In any event, these cases were decided long before this Court expressly recognized that the fundamental concept of liberty protected by the Fourteenth Amendment embraces in full degree the freedom of religion guaranteed by the First Amendment. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

> ". . . The first amendment . . . was intended to allow every one . . . to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and *to exhibit his sentiments in such form of worship as he may think proper*, not injurious to the *equal rights* of others, . . ." [Emphasis supplied]

In *Cantwell* v. *Connecticut*, 310 U.S. 296, the court stated (p. 303):

> "Thus the Amendment embraces two concepts, —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

Even the Inquisition could reach only profession or manifestation of belief. The emphasis of the First Amendment, then, on "free exercise" of religion was on the freedom to act because the law is concerned only with external behaviour. Indeed, the received definition of religion is "The service and adoration of God or a god as *expressed in forms of worship*, in obedience to divine commands, esp. as found in accepted sacred writings or as declared by recognized teachers and in the pursuit of a way of life regarded as incumbent on individual believers; . . ." Webster, Unabridged Dictionary, (2d ed.) [Emphasis supplied]

A. *The Sunday laws impose a choice of economic loss or abandonment of religious scruple.*—By prohibiting labor and prohibiting sales of goods, the Sunday laws subject to a grave economic disadvantage and severe financial pressure the individual who also closes his business or ceases labor on another day because of his religious convictions.

Despite the basic policy of the Seventh-day Adventist denomination, many of its members, constrained by economic need, have at different times sought to labor or open their shops on Sunday. Most recently, a member, one Lester Gail, who conducted a 24-hour launderette in Malden, Massachusetts, attempted to equal the 144-hour week of a competitor by opening after sundown on Saturday and on Sunday. On complaint filed by his competitor, his case was finally dismissed by the judge who noted that he had personally observed that a barroom next door and a grocery nearby were open on the prior Sunday. Under subsequent repeated threats of the chief of police he, nevertheless, remains closed on Sunday.

In Reading, Pennsylvania, the bicycle shop of Franklin Hummel, always closed on Saturday Sabbath, has, since December 11, 1959, been closed under the Sunday law with resultant loss of $10,000 in gross sales. He now must remove to a more tolerant jurisdiction or abandon his religious beliefs in observance of Saturday as the Sabbath. In September of this year a Little Rock, Arkansas, Sunday ordinance closed the electrical appliance shop of Doyle Davis although it was also always closed on Saturday. He is now forced to sell his business.

These are but current examples of the discouragements for many years effectively imposed on our members by Sunday laws such as those here involved. They could be multiplied many times. Obviously the Saturday Sabbatarian shop-keeper or mechanic is confronted with the choice of continuing to suffer this economic hardship or disregard his religious scruples. Practice of one's religion and worship of God on a day other than Sunday, no matter how devout and sincere the

belief that it is the day appointed by God for such worship, becomes, under the Sunday law, not free, but possible only by continued submission to what is in effect a special and discriminatory exaction—the sacrifice of one-sixth of the income the worshiper might otherwise enjoy. This is clearly, and most callously, stated in the recent rejection of a Jew's defense to a criminal charge for selling carpeting on Sunday. *State of New Jersey* v. *Fass*, 162 A. 2d 608 (Hudson County Ct. 1960). The court said (p. 609):

> "The defendant maintains that he is under a competitive disadvantage with respect to his business rivals because his store is closed by reason of conscience on Saturday and legal sanctions on Sunday. He contends that his economic loss is so severe that he will be required either to yield his means of livelihood or compromise his religious convictions.
>
> "It seems to me, however, that when a person embraces the obligations of a religious sect, he is faced with the necessity of assuming the financial burdens which that choice entails. The 'free' exercise of religion does not logically carry with it the proposition that the members of a sect shall not be called upon to make some financial sacrifice in its behalf. 'Free' as used in the Federal and State Constitutions is not synonymous with 'at no cost.' It signifies here rather an absence of government restriction or interference."

In other words, the Jew who chooses to adhere to the faith of his fathers may do so only by assuming a special economic burden peculiar to that religion and the religions of others who worship God on days other than Sunday.

But this Court has said: "Freedom of speech, freedom of the press, freedom of religion are available to

all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111. And "Freedom of religion is not merely reserved for those with a long purse." *Follett* v. *McCormick*, 321 U.S. 573, 576.

B. *In proselyting activities, the Sunday laws prefer the Sunday-observing religions the majority by freeing them of competition with the demands of commercial and other interests.*—Evangelist activity in spreading the word of God and seeking adherents to the doctrines of a particular denomination has long been recognized as an integral part of the "free exercise of religion" protected by the First Amendment. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 108-109. The preference given by the Sunday laws to those Christian religions that worship God on Sunday has heavy discouraging impact on Saturday-observing religions because of the economic pressures that obviously will be imposed upon the potential convert. These include probable loss of one-sixth of his income if he maintains a business or is otherwise independently engaged. If he is an employee, he runs the risk, not only of possible discharge from his particular employment but, in some States, of disqualification for unemployment compensation because he refuses to take employment that interferes with observance of the Saturday Sabbath. Ala. A, AA-90-17, BSSUI (1/18/54); Mass. A, AA-90-21, BSSUI (12/20/54), (US. Dep't. of Labor). On the other hand, the "orthodox" Christian sects are favored by the compelled leisure imposed by the Sunday laws. The result is a severe and continuous discrimination in missionary work against all religions that observe Saturday or Friday as the day of worship.

In *Judefind v. State of Maryland*, 78 Md. 510 the Court conceded (p. 515):

> "It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religions—of all sects and denominations that observe that day—as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so."

It is submitted that there can be no serious question that individual members of the Saturday-observing religions are subjected by the Sunday laws to serious and continuing prejudicial pressures and discouragement in the exercise of their religious freedom, both in worshipping on the day they believe appointed by God, and in seeking new adherents to their faiths.

C. ***By restricting recreational opportunities on Sundays the laws of many States subject the Saturday Sabbatarian to discouragements of practice of his religion.***—Even though a Jew or Seventh-day Adventist labors or conducts his business only five days a week in competition with others who do the same, he nevertheless is deprived of equal right to the recreational activities opportunity for which is now one of the asserted justifications for Sunday laws. Because enforced religious observance of Sunday is the paramount objective of the Sunday laws of many States, they contain provisions like that of Alabama (Code (1958) tit. 14, sec. 421) or of South Carolina (Code of Laws (1952) sec. 64-1):

> "No public sports or pastimes, such as bear-baiting, bull-baiting, football playing, horse-racing, interludes or common plays, or other games, exercises, sports or pastimes, such as hunting, shooting, chasing game or fishing, shall be used on Sunday by any person whatsoever."

This includes motion pictures (*Greenville Enterprise, Inc.* v. *Jennings*, 210 S.C. 163; *Carolina Amusement Co.* v. *Martin*, 115 S.E.2d 273 (S.C. 1960)) and professional baseball (*Greenville Baseball, Inc.* v. *Bearden*, 200 S.C. 363).

Thus, if one practices his religion by worshipping God on Saturday, he must forego on Sunday the recreational activities that Sunday observers may enjoy on Saturdays. The resultant discouragement to Saturday Sabbatarians is indirect but real. No Court can turn off the cumulative effect of these discouragements as inconsequential.

III. Free Exercise of Religion Is Protected Against Attacks Which, Though Indirect, Have Throttling Results Equal to Those of Frontal Assaults.

Adverse state court decisions, when they deal with the point at all, sustain the discrimination against the Saturday Sabbatarian with the suggestion that the Sunday law does not compel him to close on Saturday and, if he nevertheless chooses to do so, his resultant loss is not occasioned by state action, but merely his religious convictions. Appellant makes the same argument (Appellant's Br. in No. 11, p. 54). But the absence of direct action by the State to restrict free exercise of religion by the plaintiffs in these cases does not so simply end the inquiry into the effect of the legislation. As stated in *Schneider* v. *State*, 308 U.S. 147, 161, "In every case, therefore, where legislative abrigment of the [fundamental personal] rights is asserted, the courts should be astute to examine the effect of the challenged legislation." For, as noted in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 399; "It is not often in this country that we now

meet with direct and candid efforts to stop" exercise of First Amendment rights.

In the domain of these basic liberties, the decisions of this Court recognize that invalid abridgment of such rights, even though unintended, and not direct may inevitably follow from varied forms of governmental action. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 461. Religious freedom, like the others of the First Amendment, is protected, not only from heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Bates* v. *Little Rock,* 361 U.S. 516, 523. This Court has specifically recognized that—

> "Under some conditions, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes." (*American Communications Assn.* v. *Douds,* 339 U. S. 382, 402.)

Even if the legislation on its face, be regarded as directed to otherwise constitutional objectives, it nevertheless abridges and curtails the rights of the nonconforming individual under the First Amendment because the liberties thereunder necessarily include the guarantee that the exercise of religious belief shall not be at the cost of loss of sales, loss of wages, loss of employment and manifestations of public hostility engendered, in part at least, through the inter-action of "orthodox" public legislation and private sentiment. *American Communications Assn.* v. *Douds,* 339 U.S. 382, 392; *Watkins* v. *United States,* 354 U.S. 178, 197; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 461. "The word 'liberty" contained in that [Fourteenth] amendment embraces not only the right of a person to be free from

physical restraint, but the right to be free in the enjoyment of all his faculties as well." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244.

It was against indirect but powerful economic discouragements of the individual's exercise of his private religious belief that the First Amendment, by the broad sweep of its language, was intended to protect. As pointed out in *Everson* v. *Board of Education*, 330 U.S. 1, 8-13, a long history of violence and varied practices and persecutions motivated the broad security of the "Virginia Bill for Religious Liberty":

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, *restrained, molested,* or *burthened in his body or goods, nor shall otherwise suffer* on account of his religious opinions or belief . . ." (Emphasis supplied).

And in the same case, this Court affirmed (p. 13):

> "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adopting of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

Thus, as to freedom of religion, the First Amendment contains not only the dual prohibitions against affirmative or negative state action but also inhibits any form of burden, direct or otherwise, personal or economic, on the individual dissenter. The protection is not merely against required monetary support of a particular sect; it is broadly against restraint or burden, on person or goods, direct or indirect, on account of his religious opinions or belief.

IV. The Sunday Laws Violate the Minimal Guarantee of Equality of Treatment of All Religions and Complete Neutrality on the Part of the State.

The free exercise of religion is not a privilege conferred; it is a liberty recognized and guaranteed by the First Amendment. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115. We do not contend that any religious sect has a right to set up its own censorship against obedience to laws found desirable by the legislatures of the states. There is here presented no attempt to make variant interpretations of the Bible the test of obedience or constitutional right. We do not here assert a freedom from conformity to law because of religious dogma and no civil immunity is asserted on the basis thereof. Neither do we seek to make the phrases of earlier opinions of this Court an automatic rule for decision here. We urge here merely the long-established principle that all religions must be given equal standing and treatment under the law of every state.

The Sunday laws, as applied to Saturday Sabbatarians in the cases before this Court, violate the First Amendment because, aside from any other objective, the intrinsic result and purpose of such laws is necessarily and inevitably to discourage all sects and creeds that teach Saturday must be observed as the Sabbath.

The contention of the plaintiffs in both the *Crown Kosher* case (No. 11) and the *Braunfeld* case (No. 67) is founded, in part at least, on the basic proposition: The First Amendment, whatever else its content, does, as a minimum, guarantee religious equality; *i.e.*, no religion shall either receive the preference or support of the state or incur its hostility. This does not exhaust the content of the Amendment. But only this minimal right is here invoked.

It is not necessary here to resolve or decide the question whether, under the Constitution separation of Church and State is absolute,[17] or merely relative so as to permit preferred treatment for all religions by encouragement of religious instruction and cooperation with religious authorities.[18]

Even if it be assumed (without conceding) that the state may constitutionally give aid or favor to all religions, the appellants in the *Braunfeld* case (No. 67) and appellees in the *Crown Kosher* case (No. 11) are in no worse stead.

Decisive here is the requirement that as between religious sects the State must remain completely impartial.

Equality is instinct in the guarantees of the First Amendment. Madison in his "Memorial and Remonstrances" supporting Jefferson's "Bill for Establishing Religious Freedom in Virginia" stated (*Everson* v. *Board of Education*, 330 U.S. 1, 28, 64-66):

> "The Religion then of every man must be left to the conviction and conscience of every man; and

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[17] In *Everson* v. *Board of Education*, 330 U.S. 1, 15, and in *McCollum* v. *Board of Education*, 333 U.S. 203, 210, it is stated and repeated: "Neither [state nor Federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."

[18] In *United States* v. *Ballard*, 322 U.S. 78, 87 this Court stated: "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."

And in *Zorach* v. *Clauson*, 343 U.S. 306, 313-314: "When the state encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."

it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right . . . [A]ll men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of conscience'." [Emphasis supplied]

On June 8, 1789, Madison introduced the first proposed amendments to the Federal Constitution. The fourth and fifth of these read:

"Fourthly, that in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established nor shall the *full* and *equal* rights of conscience be in any manner, or on any pretext, infringed. . . . That in Article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit: No State shall violate the *equal rights of conscience*, or the freedom of the press, or the trial by jury in criminal cases." (1 Annals of Congress, 434-435). [Emphasis supplied]

The Committee of Eleven on August 15th referred back to the House the amendment, "nor shall the *equal* rights of conscience be infringed." (*Id.* at 729) [Emphasis supplied]

In all of its decisions, this Court has exhibited complete unanimity on one point: As between sects, the First Amendment requires that the State be completely neutral and impartial. In *Terrett* v. *Taylor*, 9 Cr. 42, the Court held (p. 49):

> "But the free exercise of religion cannot be justly deemed to be restrained by aiding with *equal attention* the votaries of every sect to perform their own religious duties * * *." (Emphasis supplied).

In *Everson* v. *Board of Education*, 330 U.S. 1, 15, the Court said, and in *McCollum* v. *Board of Education*, 333 U.S. 203, 210, i.e.—emphasized:

> "Neither [a state nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

and in the *Everson* case, the Court added (330 U.S. 1, 18):

> "That [the First] Amendment requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

The basic emphasis on equality and impartiality was reiterated in *Zorach* v. *Clauson*, 343 U.S. 306, by statement (pp. 313-314):

> "We sponsor an attitude on the part of government that shows *no partiality* to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma . . . *The government must be neutral* when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious

> observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." [Emphasis supplied]

And Mr. Justice Black, in dissent, (343 U.S. 306, 315), relied on the same principle, rigorously applied (p. 319):

> "Now as then, it is only by wholly isolating the state from the religious sphere and compelling it to be *completely neutral,* that the freedom of each and every denomination and of all non-believers can be maintained." [Emphasis supplied]

The uniform course of decision in this Court thus establishes that any legislative provision which directly or, as here, indirectly but effectively, gives substantial favor or preferential treatment to one group of religious sects and so strongly discourages another is violative of the First Amendment. As conceded in the dissent in *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 651:

> "If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand."

V. As Against First Amendment Rights, the Sunday Laws Can Be Sustained Only if the Subordinating Interest of the State Is Compelling.

As stated by Mr. Justice Cardozo in *Palko* v. *Connecticut,* 302 U.S. 319, 326:

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought

within the Fourteenth Amendment by a process of absorption."

"Rational connection" between the remedy provided by the State and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, is too "slender grounds" and will not suffice where, as here, the questioned legislation collides with the First Amendment absorbed into the Fourteenth. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 639; *Thomas* v. *Collins*, 323 U.S. 516, 530.

The applicable rule has at different times been variously stated by this Court:

Clear and present danger.—State legislation that restricts any of the fundamental freedoms may be sustained only if addressed to "a clear and present danger to a substantial interest of the State" (*Cantwell* v. *Connecticut*, 310 U.S. 296, 311) or if enforced "only to prevent grave and immediate danger to interests which the state may lawfully protect" (*West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 639) or to guard against a "clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Terminiello* v. *Chicago*, 337 U.S. 1, 4. "* * * [A]ny attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas* v. *Collins*, 323 U.S. 516, 530.

Preferred position.—The Court has reiterated that the freedoms guaranteed by the First Amendment are in a "preferred position". *Jones* v. *Opelika*, 316 U.S. 584, 600, 608 (dissenting opinion, adopted as opinion

of the court on rehearing, *per cur. Jones v. Opelika*, 319 U.S. 103); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115; *Martin* v. *Struthers*, 319 U.S. 141, 149; *Prince* v. *Massachusetts*, 321 U.S. 158, 164; *Follett* v. *McCormick*, 321 U.S. 573, 575; *Thomas* v. *Collins*, 323 U.S. 516, 527, n. 12, 530; *Marsh* v. *Alabama*, 326 U.S. 501, 509; *Everson* v. *Board of Education*, 330 U.S. 1, 28; *Saia* v. *New York*, 334 U.S. 558, 562; *United States* v. *CIO*, 335 U.S. 106, 121, n. 21; *id.*, 129, 141 (concurring opinion); *Kovacs* v. *Cooper*, 336 U.S. 77, 88.

Even those who question the "preferred position" phrase, recognize that, as stated in *Cantwell* v. *Connecticut*, 310 U.S. 296, 310—

> "* * * in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."

Accordingly they acknowledge that the First Amendment liberties "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 89, 95 (concurring opinion).

Subordinating interest of the State must be compelling.—Most recently, the stated rule is that to justify any interference with the free exercise of constitutional personal rights "the subordinating interest of

the State must be compelling." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 265 (concurring opinion); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463; *Barenblatt* v. *United States*, 360 U.S. 109, 127; *Bates* v. *Little Rock*, 361 U.S. 516, 524.

Whether we apply the standard of "clear and present danger," "grave and present danger," or "compelling subordinating interest" to the state legislation, does not affect the result. Whether we accord the guarantee of "free exercise of religion" a "preferred position" or merely a greater "momentum of respect," these phrases afford no formulae for mechanical jurisprudence. They all, however, do recognize that the presumption of validity ordinarily accompanying state legislation is in this field replaced by a careful weighing of the relative interests and consideration of how the one will be affected by the specific restriction, the other by its absence. In this process, the interests of the State are not solely on one side of the scales and limited to support of the Sunday laws. As stated by Mr. Justice Stone in his dissent in *Minersville School District* v. *Gobitis*, 310 U.S. 586, 607:

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have

recently held to infringe the constitutional liberty of religious and racial minorities." (Citing *Meyer* v. *Nebraska*, 262 U. S. 390; *Pierce* v. *Society of Sisters*, 268 U. S. 510.)

In the first instance, the weighing of the conflicting interests is for the legislative body. But the fundamental precept of the First and Fourteenth Amendments is that there shall be limitations on the power of government. Whatever the legislative judgment, therefore, this Court cannot escape answering the question independently. *Schneider* v. *State*, 308 U.S. 147, 161.

VI. The Interest of the State in Sunday Laws Is Not Compelling Because Reasonable Alternative Measures Are Open to Achieve the Same Objectives Without Violation of the Constitutional Rights of the Individual.

The task of weighing the circumstances and appraising the substantiality of the reasons in support of the legislative limitation of the free enjoyment of fundamental rights is always a difficult and delicate one. *Schneider* v. *State*, 308 U.S. 147, 161; *Thomas* v. *Collins*, 323 U.S. 516, 529-530; *Breard* v. *Alexandria*, 341 U.S. 622, 644. But the mere fact of a claimed public good never justifies the imposition of restrictions on religious liberty.

As a most logical corollary to the rule that "the subordinating interest of the State must be compelling", this Court has frequently recognized that an important element in the balancing of the relative interest, is consideration of whether there exist reasonable alternative methods of effectuating the legislative policies that underlie the statute without causing harm to the fundamental rights of the individual. Clearly enunciated in *Dean Milk Co.* v. *Madison*, 340 U.S. 349,

354, the principle has many times been applied by the Court:

In *Lovell* v. *Griffin*, 303 U.S. 444, the interest of the state in maintenance of public order and the prevention of disorderly conduct and littering of streets was held inadequate to sustain city manager censorship of door-to-door distribution because the comprehensive ordinance was "not limited [as an alternative] to ways [of distribution] which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." (p. 451).

In *Schneider* v. *State*, 308 U.S. 147, the city ordinances yielded to the individuals' constitutional freedoms because the objectives of the legislation—to prevent street litter and perpetration of fraud—could be attained by reasonable alternatives: Punishment of those actually throwing papers in the streets and denunciation and punishment of frauds and trespasses (pp. 162, 164). This, even though "these means are less efficient and convenient".

In *Thornhill* v. *Alabama*, 310 U.S. 88, the right of free speech prevailed over antipicketing legislation because the statute disregarded possible alternatives and, as the court pointed out (p. 105) it did "not aim specifically at serious encroachments on these interests [in the protection of the community from violence and breaches of the peace] and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

In *Cantwell* v. *Connecticut*, 310 U.S. 296, the guarantee of free exercise of religion made void the Connecticut statute requiring a certificate (issuable in the unlimited discretion of the welfare council secretary) because the public interest invoked prevention of frauds, public safety, comfort and convenience—were, as the Court pointed out (pp. 306-307) attainable by more reasonable provisions for identification and authorization and reasonable regulation of time and manner of solicitation.

In *Martin* v. *Struthers*, 319 U.S. 141, an ordinance based on the legitimate interest of the community in protecting the householder against the nuisance of annoyance by door-to-door distributors and in the prevention of crime (*id.*, p. 144) yielded to the freedom to make distribution of religious literature because the city had obvious and reasonable alternative means—general trespass after warning ordinances and identification devices—specifically pointed out by the Court (p. 148) as permitting the problem to be worked out with due respect for the constitutional rights of the individual.

In *Saia* v. *New York*, 334 U.S. 558, the Lockport city ordinance forbidding sound amplification devices in public places except on police permit was held to violate the right of free speech. This Court said that the community interest in peace and quiet could be attained by reasonable alternatives (p. 562): "Noise can be regulated by regulating decibels. The hours and places of public discussion can be controlled. . . . Any abuses which loud-speakers create can be controlled by narrowly drawn statutes." There was hence no compelling reason to subordinate the individual's right of free speech.

In *Kunz* v. *New York*, 340 U.S. 290, an ordinance requiring police permit to hold meeting on public streets yielded to the guarantee of free speech because the legitimate interest of the city in preventing serious interference with normal usage of streets and in preventing disorder could be attained by reasonable alternative (1) Punishment if speeches result in disorder or violence; and (2) Licensing provisions setting up appropriate standards (pp. 294-295).

It is apparent that in weighing the circumstances in cases of this kind, the Court rightly attaches pivotal importance to the question whether there are available to the State means, either by reasonable alternatives or by more narrowly drawn statutes, of protecting the community interest without abridging the constitutional rights of the individual. The broad-axe approach is not permissible when the scalpel will do.

A. *General exemptions in the Sunday laws would remedy the evil at which they aim without harm to the right of religious freedom.*—The unfairly discouraging effect of the Sunday laws on sects that observe another day as a matter of religious belief is so plain that a number of States have removed the inequality while yet obtaining the basic objective of insuring that all obtain at least one day rest in seven. These grant a general exception to those whose day of religious observance is Saturday, or, more broadly, to those whose day of religious observance is other than Sunday, simply providing that the Sunday law shall not apply to them or that the fact of such observance shall constitute a defense to prosecution for violation:[19]

[19] The statutes are set forth in full in the separately bound Statute Appendix hereto. Iowa Code Ann. Sec. 729.1, also provided a similar general exemption until its repeal. 1955 (56 G.A. ch. 273, § 1.

Conn. Gen. Stat. (1958), sec. 53-303.
Indiana Ann. Stat. (Supp. 1956), sec. 10-4301.[20]
Kentucky Rev. Stat. (1959), sec. 436.160(2).
Maine Rev. Stat. Ann. c. 134 (1954), sec. 44.
Michigan Comp. Laws (1948), sec. 435.7.
Minnesota Stat. Ann. (1947), sec. 614.30.
Ohio Rev. Code Ann. (Page, 1954), sec. 3773.24.
Virginia Code Ann. (Supp. 1960), sec. 18.1-359.
West Virginia Code Ann. (Supp. 1960), sec. 6073.

Thirteen other States grant exemption from Sunday laws that are limited to labor but do not permit the opening of shops or stores. The following state statutes grant to those who observe as a day of worship Saturday or a day other than Sunday an exemption or exception which permits work or labor on Sunday but, in plain language or by judicial construction, does not exempt the keeping open of stores or shops.[21]

Illinois Ann. Stat. ch. 38, sec. 549.
Kansas Gen. Stat. Ann. (1949) sec. 21-953.
Massachusetts Gen. Laws (1957), c. 136, sec. 6.
Missouri Ann. Stat., (1949) sec. 563.700.
Nebraska Rev. Stat., sec. 28-940.
New Jersey Rev. Stat. (1953), sec. 2A:171-4.
New York Penal Law, sec. 2144.
North Dakota Rev. Code (1943) sec. 12-2117.
Oklahoma Stat. Ann. (1951) tit. 21, sec. 909.
Rhode Island Gen. Laws (1956) sec. 11-40-4.
South Dakota Code (1939) sec. 13.1710.
Texas Pen. Code Ann. (1952) Article 284.
Washington Rev. Code (Supp. 1956) sec. 9.76.020.

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[20] This exemption may not apply to sales of motor vehicles.

[21] The Statutes are set forth in full in the separately bound Statute Appendix hereto. Arkansas provides a similar partial exemption despite repeal of its comprehensive Sunday law. Ark. Stat. Ann. (1947), § 41-3806.

The general exemptions in the statutes of nine states cited above require the conclusion that there are available reasonable alternative ways in which the State may secure its legitimate interest in the health and welfare of its citizens without infringing the constitutional immunity of the Saturday Sabbatarian from economic discouragements in the free exercise of his religion.[22]

The exemptions found in the laws of the other thirteen in the second group cited above are not acceptable as alternatives because of their limited nature. They, however, together with the general exemption laws of the nine states, do constitute a rather clear rebuttal to the suggestion sometimes made that a single and uniform day of rest—Sunday—is essential to adequate detection of violations and to satisfactory enforcement of the law and substantial attainment of the peripheral social objectives of Sunday legislation.

It necessarily follows that the Sunday laws in question here do not satisfy the test most recently laid down by this Court:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (*Bates* v. *Little Rock*, 361 U. S. 516, 524.)

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[22] State legislatures are urged to be the "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May*, 194 U.S. 267, 270; *United States* v. *Lovett*, 328 U.S. 303, 319 (conc. op.). Logically, this would seem to give importance as precedent to the general exemptions found in the legislation of the nine states cited above. Certainly it does not permit inference that the legislative guardians did not give consideration to the constitutional rights here urged.

Exempting statutes, however, in form, at least, savor more of toleration than recognition of constitutional right. Particularly is this true where, as in so many states (*e.g.*, Connecticut, Maine, Michigan, Virginia and West Virginia), the exemption contains a conditioning proviso that the Saturday Sabbatarian in exercising his exemption "not disturb other persons." It must also be noted that some courts have held that the presence in a Sunday law of a clause exempting as a class those who as a matter of conscientious belief observe another day for religious worship violates the equal protection requirement of the Fourteenth Amendment or of state constitutions by withholding the same exemption from others outside the specified class. *City of Shreveport* v. *Levy*, 26 La. Ann. 671; *Anonymous*, 12 Abb. N. C. 455 (N.Y. Sup. Ct. 1882); *Kislingbury* v. *City of Springfield*, 10 N.J. Misc. 798, 801, 160 A. 654 (Ct. Com. Pleas 1932). We question the correctness of these decisions. However, the question they raise makes more pertinent the other reasonable alternative obviously open to the States.

B. *One-day-rest-in-seven laws exemplify another reasonable alternative open to the States.*—The one-day-rest-in-seven law as enacted by a number of the States does not impinge on the individual's free exercise of his religion. Yet it plainly ensures to each individual the full period of rest that is the alleged objective of the so-called Sunday laws.

The Massachusetts Gen. Laws (1957), c. 149 provide:

> § 48. "Every employer of labor engaged in carrying on any manufacturing, mechanical or mercantile establishment or workshop in the commonwealth shall allow every person, except those specified in section fifty, but including watchmen

and employees maintaining fires, employed in such manufacturing, mechanical or mercantile establishment or workshop at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days. No employer shall operate any such manufacturing, mechanical, or mercantile establishment or workshop on Sunday unless he has complied with section fifty-one. Whoever violates this section shall be punished by a fine of fifty dollars.

§ 50 A. Every person employed as a watchman in establishments other than those described in section fifty-eight, or employed in maintaining fires in such establishments, but not including janitor in resident apartment houses, shall be allowed at least twenty-four consecutive hours of rest in every seven consecutive days. No provision of any other section of this chapter shall be construed as limiting the rights given by this section. The term "watchman" as used in section forty-eight or in this section shall include guards in banks, as defined in section one of chapter one hundred and sixty-seven. An employee violating this section shall be punished by a fine of fifty dollars.

§ 51. Before operating on Sunday, every employee subject to section forty-eight or fifty A shall post in a conspicuous place on the premises a schedule containing a list of his employees who are required or allowed to work on Sunday, and designating the day of rest for each. No employee shall be required or allowed to work on the day of rest designated for him.

The California Labor Code, Div. 2, Part 2, c. 1 provides:

Sec. 510. *Days work.* Eight hours of labor constitute a day's work, unless it is otherwise expressly stipulated by the parties to a contract.

Sec. 550. *Day's Rest Defined.* As used in this chapter "day's rest" applied to all situations whether the employee is engaged by the day, week, month, or year, and whether the work performed is done in the day or night time.

Sec. 551. *One day's rest in seven.* Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven.

Sec. 552. *Maximum consecutive working days.* No employer of labor shall cause his employees to work more than six days in seven.

Sec. 553. *Violation; misdemeanor.* Any person who violates this chapter is guilty of a misdemeanor.

Sec. 554. *Exemptions.* This chapter shall not apply to any cases of emergency nor to work performed in the necessary care of animals, crops or agricultural lands, nor to work performed in the protection of life or property from loss or destruction, nor to any common carriers engaged in or connected with the movement of any train. Nor shall the provisions of this chapter apply when the employer and a labor organization representing employees of such employer have entered into a valid collective bargaining agreement respecting the hours of work of such employees. Nothing in this chapter shall be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires that the employee work seven or more consecutive days, providing that in each calendar month the employee receive days of rest equivalent to one day's rest in seven.

In addition to the exceptions herein, the Chief of the Division of Labor Law Enforcement may, when in his judgment hardship will result, exempt any employer or employees from this chapter:

Sec. 555. *Applicability to cities and counties.* Sections 550, 551, 552 and 554 of this chapter are

applicable to cities which are cities and counties and to the officers and employees thereof.

Sec. 556. *Exemption for 30-hour week and six-hour day.* This chapter shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.

Wisconsin Stat. Ann. (1957) provide:

Title 13, sec. 103.85. *One day rest in seven.*

(1) Every employer of labor, whether a person, partnership, or corporation, who owns or operates any factory or mercantile establishment in this State, shall allow every person, except those specified in sub. (2), employed in such factory or mercantile establishment, at least 24 consecutive hours of rest in every 7 consecutive days and shall not permit any such person to work for such employer during such 24 consecutive hour period, except in case of breakdown of machinery or equipment or other emergencies, requiring the immediate service of experienced and competent labor to prevent serious injury to person, damage to property, or suspension of necessary operations, when such experienced and competent labor is not otherwise immediately available. This shall not authorize any work on Sunday not now authorized by law.

* * * * * *

Many other states of course, by appropriate legislation prescribe a maximum of 48 hours per calendar week for women generally (e.g., Ariz. Rev. Stat. Ann. (1956), sec. 23-281) or for women in specified industries and trades (e.g., Wyoming Stat. Ann. (Supp. 1959), sec. 27-218) or for persons in specified industries (e.g., Ore. Rev. Stat. (1957) secs. 652.010(2), 652.020.

The all-embracing one-day-rest-in-seven law typified by the California, Massachusetts and Wisconsin enact-

ments make clear the availability to the state governments of alternative means by which to ensure adequate rest for their inhabitants in the protection of their health.

Thus, it is manifest that there is here involved no essential protection of paramount interests of the State, and no other justification that can be deemed a compelling reason for the Sunday laws as here applied. To permit the States so clearly to discourage the Saturday Sabbatarian religions is to abridge and deny free exercise of religion in the mere guise of a health regulation.

VII. The Question Here Involved Has Never Been Considered in the Light of Present Circumstances and Giving Effect to the Legal Considerations Established by This Court as Pertinent.

The brief of the appellants in No. 11 (Appellants' Br., p. 50) urges that the one-day-rest-in-seven type statute does not ensure that all employed members of a family will have the same day off for recreation or the same week-end days as their school children. These misgivings have no basis in experience. In California and Wisconsin, where there are no Sunday laws, we are aware of no complaints of dislocations under their one-day-rest-in-seven laws. The vast majority would be subject to no compulsion to change their weekly routine.

In this connection, it must be borne in mind that federal and state wage and hour legislation, coupled with labor union requirements have in large part eliminated the abuses at which Sunday laws are allegedly aimed. Current statistics show that as of July, 1960, of the non-agricultural wage and salary

workers in the United States, about 72% work 40 hours or less per week and only 13% work more than 48 hours per week. "Employment and Earnings" (U.S. Dept. of Labor) Vol. 7, No. 2 (August, 1960) p. 9 Table A-15. The same source shows that among the self-employed more than 46% work in excess of 48 hours per week, but this includes doctors, lawyers and the other professions who are not now effectively controlled by the type of Sunday law here in question.

Contrary to the suggestion of the appellants (Br., p. 50) we do not question the validity of Sunday legislation "simply because a number of members of the public, though by no means all, regard it as a day of religious obligation." Our grievance as a matter of law is that by prohibiting work or opening of shops on Sunday, the Sunday laws penalize the Saturday Sabbatarian economically, substantially impair the freedom of choice in the individual's religion, and, by the burdens so imposed, abridge the "free exercise of religion" guaranteed on an equal basis to all. As against the basic freedom here involved, it is submitted that the State's make-weight arguments for uniformity are *de minimis* and cannot be given controlling effect. In any event, this line of argument was answered in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 640-642:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

* * * * * * * * *

> Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great.

The appellants suggest (Brief, p. 73) that the argument based on the economic discouragements of Saturday worship resulting from the Sunday closing laws has been rejected in six State Supreme Courts. Analyzed, these decisions constitute but little precedent for decision of the question here.

In Alabama, *Frolickstein* v. *Mobile*, 40 Ala. 725 (1867) was decided long before the First Amendment was recognized as absorbed into the Fourteenth. No discussion of the precise issue appears therein. In Arkansas, in *Scales* v. *State*, 47 Ark. 476, 483, 1 S.W. 769 (1886), the Court merely adopted the language of *Commonwealth* v. *Has*, 122 Mass. 40 (1877), which goes on the ground that there is no direct impairment of the rights of those sects, that worship on another day. In *Re Berman*, 344 Mich. 598, 75 N.W. 2d 8 (1956), the defendant failed to bring himself within the provision of the Detroit City Ordinance excepting from its operation "any person who conscientiously believes that the seventh day of the week should be observed as the Sabbath and actually refrains from such secular business and/or labor on that day." He owned three stores, only one of which he closed on Saturday. In *Komen* v. *City of St. Louis*, 316 Mo. 9, 289 S.W. 838 (1926), the only cited Missouri case in

which the religious liberty point was raised, the Court relied on the *Hennington* and *Petit* cases which, of course, involve no religious liberty question.

People v. *Friedman*, 302 N.Y. 75, 96 N.E. 2d 184 (1950), dismissed 341 U.S. 907 (1951), on this precise point merely stated that the law does not "work a restriction upon the exercise of religion according to the dictates of one's conscience."

In *Specht* v. *Commonwealth*, 8 Pa. St. 312 (1848), the Court justified the Sunday law, in part at least, on the ground (p. 323): "In a Christian community where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction. . . ." The decision gives no consideration to the realities of the economic burden imposed saying (p. 324):

> "* * * nor is there any hindrance offered to the full enjoyment of it [the religious belief]."

In the *Specht* case, the reference to "a Christian community" and to the rule of the "large majority of the people," found also in numerous other State decisions, is reminiscent of reliance in Spain on the fact that Catholicism is the religion of the majority as a justification for vigorous ban on missionary work by other sects. In any event, the Court in *West Virginia Board of Education* v. *Barnett*, 319 U.S. 624, conclusively disposed of this ground, saying (p. 638):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

It is submitted that the Sunday laws here involved can be sustained only if this Court blinds itself to the realities of the economic discouragements they necessary visit on the Saturday Sabbatarians. These are no less weighty—certainly they are less speculative—than the indirect discouragements for the Negro that invalidated the laws in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, and *Bates* v. *Little Rock*, 361 U.S. 516. As in *Speiser* v. *Randall*, 357 U.S. 513, 518, the deterrent effect is the same as if the State were to fine them for worshipping on Saturday.

CONCLUSION

The Seventh-day Adventist Denomination does not seek to secularize Sunday or to deprive others of their equal right to the free exercise of their religions. It here makes no plea for purely commercial interests that entertain no religious scruple and purely for gain would contest the interest, or deny the power, of the State to assure to all a periodic surcease from labor or business activity.

It is our position that, even if we assume validity of friendliness of the State to religion, all religions can be helped by furthering an atmosphere of good will among those of different faiths and that the interests of religion generally suffer when, as here, State law substantially impairs freedom of choice and liberty of conduct in the free exercise of religious belief—not

inconsistent with the health, or safety of the State or its people or offensive to their moral standards.

The wording of the First Amendment is simple and the opinions of this Court in First Amendment cases have been broad and assuring as to the free exercise of religion. Members of the Denomination, including students and thousands in other lands, await with hope decision of the vital issues in the cases now before the Court.

Respectfully submitted,

WILLIAM D. DONNELLY
1625 K Street, N. W.
Washington 6, D. C.

BOARDMAN NOLAND
208 Sherwood Building
Spokane 1, Washington

Attorneys for General Conference of Seventh-day Adventists

October, 1960

APPENDIX A

"Lord's Day."—Ga. Code Ann. (1935), § 26-6905, 26-6914; Me. Rev. Stat. Ann. (1954) ch. 134, §§ 38, 43; Maryland Ann. Code (1957) art. 27, § 492; N. H. Rev. Stat. Ann. (1955) §§ 578:4; 578:6; Pa. Stat. Ann. (1945) tit. 18, § 4699.4.

"Sabbath Day."—Ga. Code Ann. (1935) §§ 26-6903, 26-6908, 26-6910; Minn. Stat. Ann. (1947) § 614.29, 614.30; Neb. Rev. Stat. (1956) § 15-258; N. D. Rev. Code (Supp. 1957) § 12-2115; Wash. Rev. Code (1956) § 9.76.030; W. Va. Code Ann. (1955) § 6072, § 6073 (Supp. 1959).

"Christian Sabbath."—N. J. Rev. Stat. (1953) as amended (Supp. 1959), § 2A:171-1.

"Worldly employment."—N. J. Rev. Stat. (1953) as amended (Supp. 1959), § 2A:171-1; Pa. Stat. Ann. (1945) tit. 18, § 4699.

"Worldly activity."—Del. Code Ann. (1953) as amended, § 906(c) (Supp. 1958).

"Secular business."—Conn. Gen. Stat. § 53-300 (Supp. 1959); Me. Rev. Stat. Ann. (1954) ch. 134, § 43; Mich. Comp. Laws (1948) § 435.2; Vt. Stat. (1958) § 3301.

"Secular calling."—N. H. Rev. Stat. Ann. (1955) § 578.3.

"Secular work."—Va. Code Ann. § 18.1-359 (Supp. 1960); W. Va. Code Ann. § 6073 (Supp. 1959).

"Sabbath breaking."—Ind. Ann. Stat. (1956) § 10-4301; Minn. Stat. Ann. (1947) §§ 614.28; Mo. Ann. Stat. (1949) § 563.690; N. Y. Pen. Law § 2142; N. D. Rev. Code (Supp. 1957) § 12-2115; Okla. Stat. Ann. (1958) tit. 21 §§ 907, 908, 911.

"[P]rofane the Lord's day."—Md. Ann. Code (1957) art. 27, § 492.

"[D]esecration of the Sabbath day."—Neb. Rev. Stat. (1956) §§ 15-258, 16-226, 17-128; Wyo. Comp. Stat. Ann. (1957) § 15-160 (Eleventh).

"Violating" or "violations of the Sabbath."—Ga. Code Ann. (1935), § 26-6905; Miss. Code Ann. (1956) § 2368.

"[H]oly time."—N. Y. Pen. Law § 2144; Okla. Stat. Ann. (1958) tit. 21, § 909; S. D. Code (1939) § 13.1710.

APPENDIX B

"This practice of many Christians is not based upon biblical authority. Very early in its history the Christian church began the practice of celebrating its belief in the resurrection of Jesus Christ on the first day of the week." Carlyle Adams, "Our Religions", Washington *Evening Star*, Section A, p. 8, col 2, May 21, 1960.

"There are in the New Testament no commands, no prescriptions, no rules, no liturgies applying to the observance of the Lord's day." W. O. Carver, *Sabbath Observance* (Broadman Press, Nashville, Tennessee, 1940), p. 52. (Mr. Carver was professor of Comparative Religion and Missions at the Southern Baptist Theological Seminary, Louisville, Kentucky.)

"There is no definite command for this commemoration in the New Testament, and we do not know just when or where it began," *The Sunday School Magazine*, p. 166 (Methodist Publishing House, Nashville, Tenn., March, 1929).

"It will not be found in Scripture where Saturday is discharged to be kept, or turned into the Sunday; wherefore it must be the Church's authority that changed the one and instituted the other; therefore my opinion is, that those who will not keep this feast [Easter] may as well return to the observation of Saturday, and refuse the weekly Sunday." Charles II, quoted in Robert Cox,

Sabbath Laws and Sabbath Duties (Maclachlan & Stewart, Edinburgh, 1853), p. 333.

"[I]t is quite clear that however rigidly or devoutly we may spend Sunday, we are not keeping the Sabbath. . . . The Sabbath was founded on a specific, Divine command. We can plead no such command for the obligation to observe Sunday. . . . There is not a single sentence in the New Testament to suggest that we incur any penalty by violating the supposed sanctity of Sunday." R. W. Dale, *The Ten Commandments* (George H. Doran Co., New York, n.d.), pp. 104-106.

"But you may read the Bible from Genesis to Revelation, and you will not find a single line authorizing the sanctification of Sunday. The Scriptures enforce the religious observance of Saturday, a day which we never sanctify." James Cardinal Gibbons, *The Faith of Our Fathers*, 87th rev. ed. (J. Murphy & Co., Baltimore, 1917), p. 89.

"If we consulted the Bible only, we should still have to keep holy the Sabbath Day, that is, Saturday . . ." John Laux, *A Course in Religion for Catholic High Schools and Academies*, Part I (Benziger Brothers, New York, 1934) p. 51.

"Nowhere in the Bible is it stated that worship should be changed from Saturday to Sunday. The fact is that the Church was in existence for several centuries before the Bible was given to the world. The Church made the Bible, the Bible did not make the Church." Martin J. Scott, *Things Catholics are Asked About* (P. J. Kenedy & Sons, New York, 1927), p. 136.

"It is in the *tradition* of the Christian church that we find definite *authority* for applying the prescriptions of the Third Commandment [Prot. Fourth Commandment] to our Sunday. Hence, those of our countrymen who claim to guide themselves by 'the Bible only' and who reject ecclesiastical *tradition* unless backed by unmistakable Bibli-

cal testimonies should by rights subscribe their names to that somewhat obscure sect known as 'Sabbatarians,' who, as Bible Christians, more logically retain the old day of rest and occasionally get into trouble with the police when caught employing labor on Sundays. Moreover, the Bible Protestant has no 'warranty in Scripture' for convicting of sin those who, to his way of thinking, profane the sacredness of *Sunday.*'" F. M. De Zulueta, S. J. *Letters on Christian Doctrine,* First Series. 10th & rev. ed., (Burns, Oates & Washbourne, Ltd., London, 1919) Vol. 1, p. 145.

APPENDIX C

"He changeth the tymes and lawes that any of the sixe worke dayes commanded of God will make them unholy and idle dayes when he lyste, or of their owne holy dayes abolished make worke dayes agen, or when they changed ye Saterday into Sondaye. . . . They have changed God's lawes and turned them into their owne tradicions to be kept above God's precepts." *Exposicion of Daniel the Prophete,* Gathered out of Philipp Melanchton, Johan Ecolampadius, by George Joye, 1545, p. 119. (British Museum Library).

"The papacy has attempted to change the law of God. The . . . fourth commandment has been so changed as to authorize the observance of the first instead of the seventh day as the Sabbath. . . . An intentional, deliberate change is presented: 'He shall *think* to change the times and the law.' The change in the fourth commandment exactly fulfills the prophecy. For this the only authority claimed is that of the church. Here the papal power openly sets itself above God." Ellen G. White, *The Great Controversy* Pacific Press Publishing Association, Mountain View, California, 1950), p. 446.

APPENDIX D

"Ques.—Which is the Sabbath day?

Ans.—Saturday is the Sabbath day.

Ques.—Why do we observe Sunday instead of Saturday?

Ans.—We observe Sunday instead of Saturday because the Catholic Church transferred the solemnity from Saturday to Sunday."—Peter Geiermann, *The Convert's Catechism of Catholic Doctrine* (St. Louis, Mo., 1910) p. 50.

"Finally at the last opening on the 18th of January, 1563, their last scruple was laid aside. The Archbishop of Reggio made a speech in which he openly declared that tradition stood above the Scriptures. The authority of the Church could therefore no longer be bound to the authority of the Scriptures—because the Church had changed the Sabbath into Sunday—not by the command of Christ, but by its own authority." H. J. Holtzmann, *Canon and Tradition*, p. 263.

"They [the Catholics] allege the change of the Sabbath into the Lord's Day, contrary, as it seemeth, to the Decalogue; and they have no example more in their mouths than the change of the Sabbath. They will needs have the Church's power to be very great, because it hath dispensed with a precept of the Decalogue." Philip Schaff, *The Creeds of Christendom*, Vol. 3 (Harper & Brothers, New York, 1905), p. 64.

"Q. How prove you that the [Roman Catholic] Church hath power to command feasts and holydays?

"A. By the very act of changing the sabbath into *Sunday*, which Protestants allow of; and therefore they fondly contradict themselves, by keeping *Sunday* strictly, and breaking most other feasts commanded by the same church." Henry Tuberville, *An Abridgment of the Christian Doctrine* (J. B. Kirker, New York, 1860), p. 58

APPENDIX E

Ellen G. White, the early leader of the Seventh-day Adventist denomination, says in her book *The Great Controversy* (1950):

> "Royal edicts, general councils, and church ordinances sustained by secular power were the steps by which the pagan festival attained its position of honor in the Christian world. p. 574.
>
> "Yet this very class [of religious teachers who refuse to recognize the seventh-day Sabbath enjoined by the Fourth Commandment] put forth the claim that the fast-spreading corruption is largely attributable to the desecration of the so-called 'Christian sabbath,' and that the enforcement of Sunday observance would greatly improve the morals of society. This claim is especially urged in America, where the doctrine of the true Sabbath has been most widely preached. . . . The leaders of the Sunday movement may advocate reforms which the people need, principles which are in harmony with the Bible; yet while there is with these a requirement which is contrary to God's law, His servants cannot unite with them. Nothing can justify them in setting aside the commandments of God for the precepts of men." pp. 587-588.
>
> "And then the great deceiver [Satan] will persuade men that those who serve God are causing these evils. The class that have provoked the displeasure of Heaven will charge all their troubles upon those whose obedience to God's commandments is a perpetual reproof to transgressors. It will be declared that men are offending God by the violation of the Sunday-sabbath; that this sin has brought calamities which will not cease until Sunday observance shall be strictly enforced; and that those who present the claims of the fourth commandment, thus destroying reverence for Sunday, are troublers of the people, preventing their restoration to divine favor and temporal prosperity." p. 590.
>
> "They will lament the great wickedness in the world and second the testimony of religious teachers that the degraded state of morals is caused by desecration of

Sunday. Great will be the indignation excited against all who refuse to accept their testimony." p. 591.

"Those who honor the Bible Sabbath will be denounced as enemies of law and order, as breaking down the moral restraints of society, causing anarchy and corruption, and calling down the judgments of God upon the earth. Their conscientious scruples will be pronounced obstinacy, stubbornness, and contempt of authority. They will be accused of disaffection toward the government. Ministers who deny the obligation of the divine law will present from the pulpit the duty of yielding obedience to the civil authorities as ordained of God. In legislative halls and courts of justice, commandment keepers will be misrepresented and condemned. A false coloring will be given to their words; the worst construction will be put upon their motives.

"As the Protestant churches reject the clear, Scriptural arguments in defense of God's law, they will long to silence those whose faith they cannot overthrow by the Bible. Though they blind their own eyes to the fact, they are now adopting a course which will lead to the persecution of those who conscientiously refuse to do what the rest of the Christian world are doing, and acknowledge the claims of the papal sabbath. . . . Liberty of conscience, which has cost so great a sacrifice, will no longer be respected. In the soon-coming conflict we shall see exemplified the prophet's words: 'The dragon was wroth with the woman, and went to make war with the remnant of her seed, which keep the commandments of God, and have the testimony of Jesus Christ.' Revelation 12:17." p. 592.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 11

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, et al., *Appellants*,

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Massachusetts

STATUTE APPENDIX TO BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AMICUS CURIAE

WILLIAM D. DONNELLY,
1625 K Street, N. W.,
Washington 6, D. C.

BOARDMAN NOLAND,
208 Sherwood Building,
Spokane 1, Washington,

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX OF STATUTES

Page

Alabama
ALA. CODE, tit. 14, §§ 420-22 (1958) 2

Alaska
No comprehensive Sunday labor or closing law.

Arizona
No comprehensive Sunday labor or closing law.

Arkansas
ARK. STAT. ANN. (1947) § 41-3806 to 41-3809 4

California
No comprehensive Sunday labor or closing law.

Colorado
COLO. REV. STAT. Sec. 13-20-1 to -3 (Supp. 1957) 5

Connecticut
CONN. GEN. STAT. (1958) § 53-300 to -303 6

Delaware
DEL. CODE ANN. tit. 28, § 906 (1953), as amended (Supp. 1958) 9

District of Columbia
D. C. CODE (1951) Sec. 1-226 10

Florida
FLA. STAT. ANN. (1959) §§ 855.01-07 11

Georgia
GA. CODE ANN. §§ 26-6903 to -6920 (1935) 13

Hawaii
HAWAII REV. LAWS (1955), Sec. 144-33 (o) 16

Idaho
IDAHO CODE ANN. (Supp. 1959), Sec. 18-6203 17

Illinois
ILL. ANN. STAT. ch. 38, § 549 (Smith-Hurd 1935) 17

Indiana
IND. ANN. STAT. §§ 10-4301 to -4305 (1956), as amended (Supp. 1960) 18

Page

Iowa
No comprehensive Sunday labor or closing law.

Kansas
KAN. GEN. STAT. ANN. §§ 21-952 to -956 (1949) 20

Kentucky
KY. REV. STAT. § 436.160 (1959) 20

Louisiana
LOUISIANA REV. STAT. (1950), tit. 33, sec. 4783, tit. 51, § 191, 192 22

Maine
ME. REV. STAT. ANN., ch. 134, §§ 38-45 (1954), § 38-A (Supp. 1959) 23

Maryland
MD. ANN. CODE art. 27, §§ 492-534 (1957) 25

Massachusetts
MASS. GEN. LAWS ANN. (1958), Chapter 136, §§ 1-32 29

Michigan
MICH. COMP. LAWS §§ 435.1-.8 (1948) 44

Minnesota
MINN. STAT. ANN. §§ 614.28-31 (1947) 46

Mississippi
MISS. CODE ANN. §§ 2368-71 (1956) 48

Missouri
MO. ANN. STAT. §§ 563.690-730 (1949) 50

Montana
MONTANA REV. CODE (1947), Sec. 94-35-216 51

Nebraska
NEB. REV. STAT. (1956) § 15-258, 16-226, 17-128, 28-940 51

Nevada
NEVADA REV. STAT. (1957), Sec. 2-1.260. 54

New Hampshire
N. H. REV. STAT. ANN. c. 578, §§ 578.3-.13 (1955) 54

New Jersey
N. J. REV. STAT. §§ 2A:171-1 to -12 (1953), as amended (Supp. 1959) 56

Page

New Mexico
N. M. Stat. Ann. §§ 40-44-1 to -5 (1953) 62

New York
N. Y. Penal Law, §§ 2140-2152 63

North Carolina
North Carolina Gen. Stat. (1958), § 103.2 69

North Dakota
N. D. Rev. Code §§ 12-2114 to -2122 (1943), as amended (Supp. 1957), as amended (N. D. Laws 1959, ch. 131, p. 237) 69

Ohio
Ohio Rev. Code Ann. §§ 3773.23, -.24, -.26, -.99 (Page 1958), as amended (Supp. 1959) 72

Oklahoma
Okla. Stat. Ann. tit. 21, §§ 907-11 (1958), as amended (Supp. 1960) 74

Oregon
No comprehensive Sunday labor or closing law.

Pennsylvania
Pa. Stat. Ann. tit. 18, 4699.4, -.9, -10 (1945), as amended (Supp. 1959) 75

Rhode Island
R. I. Gen. Laws (1956), Sec. 11-40-1 to -4 78

South Carolina
S. C. Code §§ 64-1 to -6 (1952), as amended 79

South Dakota
S. D. Code §§ 13.1709 to .1711 (1939) 83

Tennessee
Tenn. Code Ann. §§ 39-4001 to -4003 (1955) 84

Texas
Tex. Pen. Code Ann., c. 2, Art. 283 to 287 85

Utah
Utah Code Ann. §§ 76-55-1 to -4 (1953) 87

Vermont
Vt. Stat. tit. 13, §§ 3301-08 (1958) 88

Page

Virginia
VA. CODE ANN. 18.1-358 to -363 (1960 Supp.) 89

Washington
WASH. REV. CODE c. 9.76 (1956) 92

West Virginia
W. VA. CODE ANN. §§ 6072-73 (1955), as amended (Supp. 1959) 93

Wisconsin
No comprehensive Sunday labor or closing law.

Wyoming
WYO. COMP. STAT. ANN. § 15-169 (12) (1957) (local option) 95

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Included in this Statute Appendix are all state Sunday laws that require closing of shops or refraining from labor or other activities on that day. Space considerations have precluded inclusion of isolated statutes prohibiting or regulating specific activities such as barbering, boxing, sale or delivery of liquor, service of process, or merely declaring Sunday to be a legal holiday.

Alabama

ALA. CODE tit. 14 §§ 420-22 (1958):

§ 420. *Certain acts prohibited on Sunday; punishment.*—Any person who compels his child, apprentice, or servant to perform any labor on Sunday, except the customary domestic duties of daily necessity or comfort, or works of charity or who engages in shooting, hunting, gaming, card playing or racing on that day, or who, being a merchant or shopkeeper, druggist excepted, keeps open store on Sunday, shall be fined not less than ten nor more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months. However, the provisions of this section shall not apply to the operation of railroads, stages, communications, public utilities or steamboats, or other vessels navigating the waters of this state, or to any manufacturing establishment which is required to be kept in constant operation, to the sale of gasoline or other motor fuels or motor oils. Nor shall this section prohibit the sale of newspapers, or the operation of newsstands, or automobile repair shops, florist shops, fruit stands, ice cream shops or parlors, lunch stands or restaurants, delicatessen or plants engaged in the manufacture or sale of ice, provided such business establishments are not operated in conjunction with some other kind or type of business which is prohibited by this section. It shall also be lawful to engage in motorcycle and automobile racing on Sunday, whether admission is charged or not, except that this proviso shall not be construed to prevent any municipality from passing ordinances prohibiting such racing on Sunday.

§ 421. *Sunday baseball, moving pictures, etc.*—Any person or persons who play or engage in the playing of any baseball, football, tennis, or golf on Sunday, in any public place or places where people resort for such purpose, shall be guilty of a misdemeanor, and shall be fined not less

than twenty-five dollars nor more fifty dollars. Provided, that it shall be lawful in cities whose population is not less than fifteen thousand inhabitants nor more than sixty thousand inhabitants, according to the last or any subsequent federal census, and within the police jurisdiction thereof, to engage in the playing of tennis, golf, and in operating moving picture shows on Sunday whether admission is charged or not. In any such city, the acts or any of them herein referred to may be prohibited by an ordinance passed by the governing body of such city. . . . Provided further, that it shall be lawful in cities of sixty thousand population, or more, according to the last, or any subsequent federal census, to play or engage in playing football, tennis, golf, and to operate moving picture shows and vaudeville on Sunday, whether admission is charged or not. In any such city the acts herein permitted may be prohibited by an ordinance passed by the governing body of such city. . . . Provided still further, that it shall be lawful to engage in motorcycle and automobile racing on Sunday, whether admission is charged or not, except that nothing herein shall be construed to prevent any municipality from passage of ordinances prohibiting such racing on Sunday. And provided further, it shall be lawful to engage in the playing of baseball on Sunday, whether admission is charged or not, but nothing herein shall be construed to prevent any municipality from the passage of ordinances prohibiting the playing of baseball on Sunday.

§ 422. *Holding Public markets and trading therein on Sunday.*—Any person who opens, or causes to be opened, for the purpose of selling or trading, any public market or place on Sunday, or opens, or causes to be opened, any stall or shop therein, or connected therewith, or brings anything for sale or barter to such market or place, or offers the same for sale therein on that day, or buys or sells therein on that day (including livestock or cattle), shall, on conviction, be punished as prescribed in section

420 of this title. Any place where people assemble for the purchase and sale of goods, wares, and merchandise, provisions, cattle, or other articles is a market house or place, within the meaning of this section.

Alaska

No comprehensive Sunday labor or closing law.

Arizona

No comprehensive Sunday labor or closing law.

Arkansas

ARK. STAT. ANN. (1947)

41-3806. *Persons not keeping Christian Sabbath partially excepted.*—No person who from religious belief keeps any other day than the first day of the week as the Sabbath shall be required to observe the first day of the week, usually called the Christian Sabbath, and shall not be liable to the penalties enacted against Sabbath breaking: Provided, That no store or saloon shall be kept open or business carried on therein on the Christian Sabbath; and Provided further, That no person so observing any other day shall disturb any religious congregation by his avocations or employments.

41-3807. *Horse racing or cock fighting—Penalty.*—Every person who shall, on the Christian Sabbath or Sunday, be engaged in (any horse race, or) the running of any single horse, for any bet, or wager on the speed of such horse or horses or for pastime, or for amusement without any bet or wager, or shall be engaged in any cock fight on any bet or wager, or for pastime, without bet or wager, shall be adjudged guilty of a misdemeanor, and on conviction, shall be fined in any sum not exceeding one hundred dollars [$100.00] nor less than twenty dollars [$20.00].

41-3808. *Horse racing or betting—Penalty.*—If any person shall be engaged in running a horse-race on the day

known as the Christian Sabbath or Sunday, on a bet or wager, or for sport or pastime, with or without such bet or wager, he shall be deemed guilty of a misdemeanor; and, on conviction thereof, shall be fined in any sum not less than twenty-five [$25.00] nor more than one hundred dollars [$100.00].

41-3809. *Playing cards—Penalty.*—Every person who shall, on the Christian Sabbath or Sunday, be engaged in any game of brag, bluff, poker, seven-up, three-up, twenty-one, vingtien, thirteen cards, the odd trick, forty-five, whist, or at any other game at cards known by any name now known to the laws, or with any other new name, for any bet or wager on such games, or for amusement, without any bet or wager, shall, on conviction thereof, be fined in any sum not less than twenty-five dollars [$25.00] nor more than fifty dollars [$50.00].

California

No comprehensive Sunday labor or closing law.

Colorado

COLO. REV. STAT. SECS. 13-20-1 to -3:

SEC. 13-20-2. (Supp. 1957) *Sunday closing.*—No person, firm or corporation, whether owner, proprietor, agent or employee, shall keep open, operate or assist in keeping open or operating any place or premises or residences whether open or closed, for the purpose of selling, bartering or exchanging, or offering for sale, barter or exchange, any motor vehicle or motor vehicles, whether new, used or second hand, on the first day of the week, commonly called Sunday; and provided, however, that this article shall not apply to the opening of an establishment or place of business on the said first day of the week for other purposes, such as the sale of petroleum products, tires, automobile accessories, or for the purpose of operating and conducting a motor vehicle repair shop, or for the purpose of supplying such services as towing or wrecking.

Connecticut

CONN. GEN. STAT. (1958) § 53-300 to -303:

Sec. 53-300 (Supp. 1959). *Work and recreation on Sunday.*—Any person who does, or requires an employee to do, any secular business or labor, except works of necessity or mercy, or, unless required by necessity or mercy, keeps open any shop, warehouse or manufacturing or mechanical establishment, or sells or exposes for sale any goods, wares or merchandise, or, except as hereinafter provided, engages in any sport, between the hours of twelve o'clock Saturday night and twelve o'clock Sunday night next following, shall be fined not more than fifty dollars. The provisions of this section shall not prohibit the making of emergency repairs to motor vehicles, motorcycles, motor boats and aircraft, including the furnishing of any labor or the sale of gasoline necessary to permit the same to proceed under their own power, nor the towing or washing of any such motor vehicles, motorcycles, motor boats or aircraft *nor prohibit the production or distribution of any newspaper or regularly published magazine.* The provisions of this section shall not affect the issue or service of any criminal complaint or any proceedings thereon, nor the issue or service of complaints for injunctions and orders thereon, nor the issue or service of any other civil process, except between sunrise and sunset on Sunday. The foregoing provisions of this section shall not apply to any amateur ball game or other outdoor game or sport by or between amateurs on Sunday; provided no admission fee shall be charged and the same shall be so conducted as not to interfere with public worship or disturb the reasonable comfort, quiet and peace of any person. The park commissioners or park committee of any town, city or borough are authorized to permit free concerts of music to be given, and amateur athletic sports to be engaged in, on Sunday, at stated places, in one or more of the public parks belonging to such town, city or borough, subject to such rules as the respective committee

or commissioners may adopt for the purpose of securing order and quiet conduct on the part of all who engage in such music or sports and also of all persons in attendance; provided only places shall be so designated where such music can be given or sport engaged in without disturbing the reasonable comfort, quiet and peace of any other person, and provided no game or sport shall be permitted in any tournament or for any admission fee or prize. Any person who is present at any concert of music, dancing or other public diversion on Sunday or on the evening thereof, except as permitted by this section, shall be fined not more than four dollars. The provisions of this section shall not affect the provisions of sections 7-164 to 7-168, inclusive, 27-35, 53-302 and 53-303. Any prosecution for the violation of any of the provisions of this section shall be brought within one month after the commission of the offense. The sale of dairy products, fresh eggs, fresh agricultural products, horticultural products, bakery products, fruit, ice, ice cream, confectionery, nonalcoholic beverages, tobacco in any form, smokers' supplies, antiques, newspapers and other periodicals, * * * *medical supplies* or supplies and repair parts for motor vehicles, motorcycles, motor boats and aircraft, by retail dealers whose places of business are open for the sale thereof on secular days, shall not be a violation of the provisions of this section.

Sec. 53-301 (1958). *Dealing in automobiles on Sunday.*— No person, firm or corporation engaged in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles shall open any place of business or lot wherein he attempts to or does engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles, or buy, sell, exchange, deal or trade in new or used motor vehicles as a business on Sunday. Any person who violates the provisions of this section shall be fined not more than fifty dollars for the first offense and not more than one hundred dollars for each subsequent offense. Any licensed motor vehicle dealer

who violates the provisions of this section shall, in addition to the fine provided herein, be subject to suspension of license as provided in section 14-64.

Sec. 53-302 (1958). *Employment of labor on Sunday.*—Except in cases of emergency, no person shall require or permit any employee engaged in any commercial occupation or in the work of any industrial process to do any work of his occupation on Sunday, unless such employee is relieved from work for one full regular working day during the six days next ensuing. This section shall not be construed as authorizing any work on Sunday not authorized by law; nor as applying to farm or personal service, to druggists, watchmen, superintendents or managers, janitors or persons engaged solely in transportation, nor to the sale or delivery of milk, food or newspapers, nor to such commercial occupations or industrial processes as by their nature are required to be continuous; nor as prohibiting the doing of necessary work of inspection, repair or care of any manufacturing or other plant or of any merchandise or stock on Sunday. Any person violating any provision of this section shall be fined not more than two hundred dollars for each offense.

Sec. 53-303 (1958). *Persons who observe Saturday excepted from Sunday law.*—No person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, or who conscientiously believes that the Sabbath begins at sundown on Friday night and ends at sundown on Saturday night, and actually refrains from secular business and labor during said period, and who has filed written notice of such belief with the prosecuting attorney of the court having jurisdiction, shall be liable to prosecution for performing secular business and labor on Sunday, provided he shall not disturb any other person who is attending public worship.

Delaware

DEL. CODE ANN. tit. 28, § 906 (1953), as amended (Supp. 1958):

§ 906. *Regulation of public entertainment on Sundays.*

(a) No person shall engage in, participate in, or attend, outside the corporate limits of any incorporated city or town of this State, any horse racing, public auction, public dance, public theatrical performance or public performances of motion pictures on Sunday except that this prohibition shall not apply to public performances of motion pictures, with or without sound, between the hours of twelve noon and 6 P.M. and between the hours of 8 P.M. and midnight in Kent County and Sussex County, and between the hours of 2 P.M. and midnight in New Castle County.

(b) No person shall engage in, participate in, or attend any of the activities mentioned in subsection (a) of this section within the limits of any incorporated city or town of this State with a population of less than 100,000 on Sunday before the hour of 12 noon and between the hours of 6 p.m. and 8 p.m. and within the limits of any incorporated city or town of this State with a population of more than 100,000 on Sunday before the hour of 2 p.m.

(c) The city or town council or other legislative body of any incorporated city or town may prohibit or regulate by ordinances or other legislative act any worldly activity other than those mentioned in subsection (a) of this section before 12 noon and between the hours of 6 p.m. and 8 p.m. on Sunday.

The city or town council or other legislative body of any incorporated city or town may prohibit or regulate any worldly activity on Sunday between the hours of noon and 6 p.m. and between the hours of 8 p.m. and midnight on Sunday.

(d) The term "theatrical performance" in this section does not include the reception of broadcast, radio or television programs or any lecture or musical concert.

(e) Whoever violates any provision of this section shall for the first offense be fined not less than $10 nor more than $50, or imprisoned not more than 10 days or both. For the second and each subsequent offense he shall be fined not less than $50 nor more than $250, or imprisoned for not more than 2 months, or both.

(f) Any justice of the peace of the county shall have jurisdiction and cognizance of the offenses mentioned in this section.

District of Columbia

D. C. CODE, (1951):

Sec. 1-226. *Regulations for protection of life, health and property.*

The Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations in addition to those already made under sections 1-224, 1-225, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia.

Police Regulations of the District of Columbia (1955) provide:

Article 2. *Licensed Vendors and Speakers on Streets and in Public Places.*

Section 1. * * *

* * * Nor shall any such [licensed street] vendor ply his trade or solicit custom upon any such places [highways or public places] between the hours of 10 p.m. and 7 a.m. nor on Sunday, or at any time so as to interfere with the traffic or cause annoyance to residents or passersby: * * *

Article 6. *Regulation of Loud Noises and Cries upon Streets and in Public Places.*

* * * * * * * * * * *

Section 4.

(d) * * * None of the said activities [circus, rodeo, carnival, fair, performance, singing, playing of musical or other instruments, dancing or amusement of any kind] shall be conducted on the secular days of the week after 11:30 p.m. nor on the first day of the week, commonly called Sunday, except between the hours of 2 p.m. and 11 p.m. * * *

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Art. 17. *Places of Public Assembly.*

* * * * * * * * * * *

Sec. 18. No owner, proprietor, lessee, tenant, or other person shall on the first day of the week, commonly called Sunday, between the hours of 3 a.m. and 1 p.m. in any public place of amusement, theatre, or other building, or part thereof, permit, allow, or take part in any manner in any public exhibition of any entertainment, motion-picture show, play, opera, circus, animals, gymnastics, game, dance, or dances or vaudeville performances of any kind to which an admission fee is charged, directly or indirectly. * * *

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Article 25. *Miscellaneous Regulations.*

* * * * * * * * * * *

Section 14. (a) No work nor labor of any kind shall be permitted on Sunday in the excavation, construction, erection, repair or demolition of any building in or within 200 feet of any residential section of the District of Columbia as defined in the zoning regulations, * * *.

Florida

FLA. STAT. ANN. (1959) §§ 855.01-07:

§ 855.01. *Following trade, etc., on Sunday.*

Whoever follows any pursuit, business or trade on Sunday, either by manual labor or with animal or mechanical.

power, unless the same be work of necessity, shall be punished by a fine not exceeding fifty dollars; provided, however, that nothing contained in the laws of Florida shall be so construed as to prohibit the preparation or printing between the hours of midnight Saturday and six in the morning, Sunday, of any newspaper intended to be circulated and sold on Sunday, or to prohibit the circulation and sale on Sunday of same, or to prohibit the circulation and sale on Sunday of any newspaper theretofore printed; provided nothing contained in this section shall apply to theaters in which moving pictures are shown.

§ 855.02. *Selling goods on Sunday.*

Whoever keeps open store or disposes of any wares, merchandise, goods or chattels on Sunday, or sells or barters the same, shall be punished by a fine not exceeding fifty dollars. In cases of emergency or necessity, however, merchants, shopkeepers and others may dispose of the comforts and necessaries of life to customers without keeping open doors.

§ 855.03. *Employing servants.*

Whoever employs his apprentice or servant in labor or other business on Sunday, unless it be in the ordinary household business of daily necessity, or other work of necessity or charity, shall be punished by a fine not exceeding ten dollars for every such offense.

§ 855.04. *Use of firearms on Sunday.*

Whoever uses firearms by hunting game upon Sunday shall be punished by a fine not exceeding one hundred dollars, or by fine not exceeding twenty-five dollars.

§ 855.05. *Penalty for engaging in game or sport on Sunday.*

Whoever engages on Sunday in any game or sport, such as football or bowling, as played in bowling alleys, or horse racing, whether as player, manager, director or

otherwise, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months.

§ 855.06. *Trap and skeet shooting on Sunday.*

It shall be lawful to engage in the sport of trap, target and skeet shooting on Sunday.

§ 855.07. *Baseball on Sunday; Industrial plants continuously operated.*

It shall be lawful to engage in, operate, follow the business or trade of, and employ persons, including without limitation agents, servants and apprentices, in the playing of baseball between the hours of two o'clock P.M. and eleven o'clock P.M. on Sundays; and to operate on Sunday and employ persons in the operation of industrial plants designed and intended for continuous operation.

Georgia

GA. CODE ANN. §§ 26-6903 to -6920 (1935):

§ 26-6903. *Running freight trains on Sabbath.*—If any freight train, excursion train, or other train than the regular trains run for the carrying of mails or passengers, shall be run on any railroad on the Sabbath day, the superintendent of transportation of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable to indictment in each county through which such train shall pass, and shall be punished as for a misdemeanor.

The foregoing provisions shall not extend to [Specified train operations].

. . . . . .

§ 26-6904. *Allegation and proof on the trial.*—On the trial for the violation of the preceding section, it shall

not be necessary to allege or prove the name of any employee engaged on such train, but it shall be sufficient to prove that the train was run. The defendant may justify himself by proving that such employees acted in direct violation of his orders and rules.

§ 26-6905. *Violating the Sabbath day.*—Any person who shall pursue his business or the work of his ordinary calling on the Lord's day, works of necessity or charity only excepted, shall be guilty of a misdemeanor.

§ 26-6906. *Hunting on Sunday.*—Any person who shall hunt any kind of game with gun or dogs, or both, on the Sabbath day shall be guilty of a misdemeanor.

§ 26-6907. *Discharging gun or pistol on Sunday.*—Any person who shall wilfully or wantonly fire off or discharge any loaded gun or pistol on Sunday, except in defense of person or property, shall be guilty of a misdemeanor.

§ 26-6908. *Fishing on Sunday.*—Any person who shall fish or attempt to catch any kind of fish with hook and line, nets, gigs, or by any other manner or means, in any of the waters or streams within the State on the Sabbath day, shall be guilty of a misdemeanor.

§ 26-6909. *Causing convict to work on Sunday.*—Any warden or other prison official who shall cause any convict to do any work on Sunday, except works of necessity, shall be guilty of a misdemeanor.

§ 26-6910. *Indecent bathing on Sunday.*—Any person who shall bathe in a stream or pond of water on the Sabbath day, in view of a road or passway leading to or from a house of religious worship, shall be guilty of a misdemeanor.

. . . . . .

§ 26-6914. *Dancing in public places on Sunday.*—Dancing at any public place on the Lord's day, commonly known as Sunday, is hereby prohibited. The owner, proprietor,

manager, agent, lessee or tenant of any public place who shall permit dancing at said public place on the Lord's day, commonly known as Sunday, shall be guilty of a misdemeanor.

§ 26-6915. *Sunday motion pictures and athletic contests; horse and dog racing; policy of State.*—Since motion picture theatres are being operated, and athletic events, games and contests are being held, on Sundays in most of the principal towns and cities of the State, it is hereby declared to be the policy of this State that a method should be provided whereby the citizens of any town or county may provide for the operation or prohibit the operation of motion picture theatres, and for holding of athletic events, games and contests, or for prohibiting the same, on Sundays. Nothing in sections 26-6915 to 26-6920 shall legalize horse or dog racing within the State of Georgia.

§ 26-6916. *Same; motion pictures and contests legalized; permits.*—It shall be lawful for the operator or operators of any motion picture theatres and for those sponsoring or holding athletic events, games and contests to hold the same on Sunday: Providing, that before such shall be lawful the operator, operators or sponsors shall first obtain a permit from the mayor and council or other governing body of any municipal corporation within which the place of operation or showing are located; and if such theatre or place of holding such athletic event lies outside of such municipal corporation such permits shall be first obtained from the county commissioner or other governing body of the county in which said theatre or place of holding such games and contests are to take place. In the event Sunday movies are licensed in a community the operator shall show once each month a show on either a religious or educational subject.

§ 26-6917. *Same; petition of citizens to have permit granted.*—If any such permit is refused by the mayor and council or other governing body of any municipal

corporation for the operation of any theatre or athletic event, game or contest, as the case may be within the limits of such municipal corporation; or, such refusal is made by the board of county commissioners or other governing official or governing body of the county as to theatres, or as to such events, games or contests, as the case may be, within the county, but outside of any municipal corporation, then, upon the presentation of a petition to the mayor and council, or the governing body of any municipal corporation, or to the board of county commissioners or other governing official or governing body of the county, if said theatres or the places for holding such athletic events, games or contests, lie outside the limit of any municipal corporation, bearing the names of at least 25 per cent of the registered voters of said municipal corporation, or county, as the case may be, requesting that such permits be issued, then it shall be the duty of the governing bodies of such municipal corporations or counties, as the case may be, to issue such permits.

§ 26-6918. *Same; petition of citizens opposing issuance of permit; election to determine issue. . . .*

§ 26-6919. *Same; verification of petitions. . . .*

§ 26-2920. *Same; penalty for violation of law.*—Any person or persons, whether owners, operators or managers of any such theatres as may be operated on Sunday or any person or persons, whether sponsors, owners or managers of any such athletic events, games or contest, as may be held on Sundays, without first obtaining a permit as provided for in sections 26-6915 to 26-6919 shall be punished as for a misdemeanor.

Hawaii

HAWAII REV. LAWS (1955) § 144-33:

Powers of the board of supervisors. The board of supervisors of each county shall have general supervision and control of all its public affairs of the county and the super-

vision of all subordinate affairs, and, without prejudice to the generality of the foregoing powers, shall, except as otherwise provided, have the following specific powers:

* * * * * * * * * * *

(o) *Sunday entertainments.* To provide by ordinance for the exhibiting of moving pictures on Sundays after the hours of 12:30 P.M., and legitimate stage play productions on Sunday after 6:30 P.M., under such restrictions as they may prescribe.

Idaho

IDAHO CODE ANN. (Supp. 1959) § 18-6203:

Public amusements—Local option procedure—Penalties. It shall be unlawful for any person or persons in this state to keep open on Sunday any dance house after one o'clock a.m., race track, except automobile race tracks between the hours of one o'clock p.m. and four-thirty o'clock p.m. where automobile racing is conducted under the auspices of an association duly chartered and licensed under the corporation laws of the state of Idaho, merry-go-round prior to one o'clock p.m., circus or show, concert saloon, billiard or pool room, or variety hall. * * *

Illinois

ILL. ANN. STAT. ch. 38, § 549 (Smith-Hurd 1935):

§ 549. *Disturbing peace of society on Sunday.—Exceptions.*—Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion on Sunday, shall be fined not exceeding $25. This section shall not be construed to prevent watermen and railroad companies from landing their passengers, or watermen from loading and unloading their cargoes, or ferrymen from carrying over the water travelers and persons moving their families, on the first day of the week, nor to prevent the due exercise of the rights of conscience by whomever think proper to keep any other day as a Sabbath.

Indiana

IND. ANN. STAT. §§ 10-4301 to -4305 (1956), as amended (Supp. 1960):

§ 10-4301. *Sabbath breaking—Sunday baseball—Ice hockey.*—Whoever being over fourteen [14] years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, quarreling, at common labor, or engaged in his usual vocation, works of charity and necessity only accepted, shall be fined not less than one dollar [$1.00] nor more than ten dollars [$10.00]; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travelers, and those engaged in conveying them, families removing, keepers of toll bridges and toll gates, ferrymen acting as such and persons engaged in the publication and distribution of news, or persons engaged in playing the game of baseball or ice hockey after one o'clock P.M. and not less than one thousand [1,000] feet distant from any established house of worship or permanent church structure used for religious services, or any public hospital or private hospital erected prior to the passage of this act.

§ 10-4302. *Football and other games on Sunday.*—It shall be unlawful for any person or persons to engage in playing any game of football, or other game where any fee is charged, or where any reward or prize, or profit, or article of value is depending on the result of such game, on the first day of the week, commonly called Sunday; and every person so offending shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not exceeding twenty-five dollars [$25.00].

§ 10-4303. *Hunting on Sunday prohibited—Penalty.*—It shall be unlawful for any person to hunt, shoot, or kill any wild birds, wild animals and fur bearers now protected by law on the first day of the week commonly known as Sunday. Any person violating the provisions of this act

shall on conviction be fined in any sum not less than ten dollars [$10.00] nor more than fifty [$50.00] dollars.

. . . . . .

§ 10-4305. *One dealing in new or used motor vehicles on Sunday—Disorderly person—Penalties.*—Any individual motor vehicle retail dealer, any member of a partnership or a firm which operates a motor vehicle establishment, or any officer or director of a corporation which operates a motor vehicle establishment, or any agent or employee of such individual, partnership, firm or corporation, who shall carry on or engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles, or who shall open any motor vehicle retail establishment wherein he attempts to or does engage in the business of buying, selling, exchanging or trading in new or used motor vehicles, or who does buy, sell, exchange or trade in new or used motor vehicles, on the first day of the week, commonly called Sunday, is hereby declared to be a disorderly person. Any person so declared to be a disorderly person shall be guilty of a misdemeanor and, upon a first conviction, shall be liable to a fine of not to exceed one hundred dollars [$100], to which may be added imprisonment for a determinate period of time of not to exceed ten [10] days, or to both such fine and imprisonment; for a second offense, upon conviction, he shall be liable to a fine of not to exceed five hundred dollars [$500], to which may be added imprisonment for a determinate period of time of not to exceed thirty [30] days, or to both such fine and imprisonment; and for a third and each subsequent offense, upon conviction, he shall be liable to a fine of seven hundred and fifty dollars [$750], to which may be added imprisonment for a determinate period of time of not to exceed six [6] months, or to both such fine and imprisonment.

Iowa

No comprehensive Sunday labor or closing law.

Kansas

KAN. GEN. STAT. ANN. §§ 21-952 to -956 (1949):

§ 21-952. *Laboring on Sunday; penalty.* Every person who shall either labor himself or compel his apprentice, servant or any other person under his charge or control to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding twenty-five dollars.

§ 21-953. *Exceptions to § 21-952.* The last section shall not extend to any person who is a member of a religious society by whom any other than the first day of the week is observed as the Sabbath, so that he observes such Sabbath, nor to prohibit any ferryman from crossing passengers on any day in the week.

§ 21-954. *Games on Sunday; penalty.* Every person who shall be convicted of horse racing, cockfighting, or playing at cards or game of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.

§ 21-955. *Sales on Sunday; penalty.* Every person who shall sell or expose to sale any goods, wares or merchandise, or shall keep open any grocery, on the first day of the week, commonly called Sunday, shall on conviction be adjudged guilty of a misdemeanor, and fined not exceeding fifty dollars.

§ 21-956. *Exceptions to § 21-955.* The last section shall not be construed to prevent the sale of any drugs or medicines, provisions, or other articles of immediate necessity.

Kentucky

KY. REV. STAT. § 436.160 (1959):

Working, holding boxing or wrestling match, playing billiards or pool or hunting, on Sunday. (1) Any person

who works on Sunday at his own or at any other occupation or employs any other person, in labor or other business, whether for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system, shall be fined not less than two dollars nor more than fifty dollars. The employment of every person employed in violation of this subsection shall be deemed a separate offense.

(2) Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one day in each seven.

(3) Subsection (1) of this section shall not apply to amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera.

(4) Any person who holds any boxing or wrestling match or exhibition on Sunday shall be fined not less than ten dollars nor more than one hundred dollars.

(5) Any person licensed to keep, or any person controlling, a billiard, pigeon-hole or pool table who permits any game to be played on it on Sunday shall be fined not less than twenty-five dollars nor more than sixty dollars, and forfeit his billiard, pigeon-hole or pool table license if he holds such license.

(6) Any person who hunts game, with a gun or dogs, on Sunday shall be fined not less than five dollars nor more than fifty dollars.

Louisiana

LOUISIANA REV. STAT. (1950) tit. 33, Sec. 4783; tit. 51, §§ 191, 192:

Title 33

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Sec. 4783. *Sunday closing of butcher shops and bakeries in cities of over 25,000.*

Municipalities having a population of over twenty-five thousand may regulate or prohibit the opening and closing of butcher shops, meat markets, baker shops, and bakeries within their corporate limits on Sunday. Municipalities of over one hundred thousand may also regulate or prohibit the sale and delivery of bakery products within their corporate limits on Sunday.

Municipalities may punish by penal ordinance violations of ordinances passed in pursuance of this Section.

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Title 51.

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PART V. SUNDAY LAWS

§ 191. *Places of business to be closed; penalty.*

All stores, shops, saloons, and all places of public business, licensed under the law of Louisiana or under any parochial or municipal law and all plantation stores, shall be closed at twelve o'clock on Saturday nights, and remain closed continuously for twenty-four hours, during which time no proprietor thereof shall give, trade, exchange or sell any of the stock or any article of merchandise kept in his establishment.

Whoever violates this Section shall be fined not less than twenty-five dollars nor more than two hundred and fifty dollars, or imprisoned for not less than ten days nor more than thirty days, or both for each offense.

§ 192. *Exemptions.*

The provisions of R.S. 51:191 shall not apply to newsdealers, the sale of ice, watering places and public parks, places of resort for recreation and health, newspaper offices, keepers of soda fountains, printing offices, book stores, drug stores, apothecary shops, undertaker shops, public and private markets, bakeries, dairies, livery stables, railroads, whether steam or horse, hotels, boarding houses, steamboats and other vessels, warehouses for receiving and forwarding freights, restaurants, telegraph offices and theatres, or any place of amusement, unless intoxicating liquors are sold in the premises. Stores may be opened for the purpose of selling anything necessary in sickness and for burial purposes.

Hotels or boarding houses may sell wine for table use on Sundays. No alcoholic, vinous or malt liquors shall be given, traded or bartered or sold or delivered in any public place on Sundays, except when administered or prescribed by a practicing physician in the discharge of his professional duties. In which case the physicians administering the intoxicating liquors may charge therefor.

Maine

ME. REV. STAT. ANN. ch. 134, § § 38-45 (1954) § 38-A (Supp. 1959):

Sec. 38. *Business, traveling and recreation on the Lord's Day.*—Whoever, on the Lord's Day, keeps open his shop, workhouse, warehouse or place of business; travels; does any work, labor or business on that day, except works of necessity or charity; uses any sport, game or recreation; or is present at any dancing, public diversion, show or entertainment, encouraging the same, shall be punished by a fine of not more than $10; provided, however, that this section shall not apply to the operation of common carriers; to the driving of taxicabs and public carriages; to the operation of airplanes; to the driving of private auto-

mobiles or other vehicles; to the printing and selling of Sunday newspapers; to the keeping open of hotels, restaurants, garages, grocery stores and drug stores; to the selling of gasoline; or to the giving of scientific, philosophical, religious or educational lectures, or to musical concerts or theatrical productions.

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Sec. 38-A. (Supp. 1959). *Sunday sales of motor vehicles and mobile homes prohibited.*—Any person who shall carry on or engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles or mobile homes; or who shall open any place of business or lot wherein he attempts to or does engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles or mobile homes; or who does buy, sell, exchange, deal or trade in new or used motor vehicles or mobile homes as a business on the first day of the week, commonly known and designated as Sunday, is a disorderly person. Such a disorderly person, upon conviction for the first offense shall be punished by a fine of not more than $100 or by imprisonment for not more than 10 days, or by both; and for the second offense shall be punished by a fine of not more than $500 or by imprisonment for not more than 30 days, or by both; and for the third or each subsequent offense shall be punished by a fine of not more than $750 or by imprisonment for not more than 6 months, or by both. If the person is the holder of dealer or transit registration plates under chapter 22, sections 26 or 26-A, such person shall also be subject to the suspension or revocation of said plates, as provided for in chapter 22, section 27, for the violation of this section.

Sec. 39. *Sunday sports legalized; local option.* * * *

Sec. 40. *Sunday bowling legalized; local option.* * * *

Sec. 41. *Sunday moving pictures legalized; local option.* * * *

Sec. 43. *Innholders and victualers not to allow gambling, diversion or business on Lord's Day.*—If an innholder or

victualer, on the Lord's Day, suffers any persons, except travelers, strangers, or lodgers, to abide in his house, yard or field, drinking or spending their time idly at play, or doing any secular business except works of charity or necessity, he shall be punished by a fine of not more than $4 for each person thus suffered to abide; and if after conviction he is again guilty, by a fine of not more than $10 for each offense; and upon a 3rd conviction, he shall also be incapable of holding any license; and every person so abiding shall be punished by a fine of not more than $4 for each offense.

Sec. 44. *Persons conscientiously observing the 7th day.*—No person conscientiously believing that the 7th day of the week ought to be observed as the Sabbath, and actually refraining from secular business and labor on that day, is liable to said penalties for doing such business or labor on the 1st day of the week, if he does not disturb other persons.

Maryland

MD. ANN. CODE art. 27, §§ 492-534 (1957)

§ 492. *Working on Sunday; permitting children or servants to game, fish, hunt, etc.*

No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation; and every person transgressing this section and being hereof convicted before a justice of the peace shall forfeit five dollars, to be applied to the use of the county.

§ 493. *Sports in Frederick City and sports and music in Frederick County.* * * *

§ 494. *Same—Penalty.* * * *

§ 495. *Motion pictures in Frederick City.* * * *

§ 496. *Same—Penalty.* * * *

§ 497. *Baseball, basketball, bowling and swimming in Hagerstown.* * * *

§ 498. *Same—Officiating at or assisting in conduct of baseball game.* * * *

§ 499. *Same—Penalty.* * * *

§ 500. *Sports in Kent, Caroline and Montgomery counties.* * * *

§ 501. *Same—Officiating at or assisting in conduct of games.* * * *

§ 502. *Motion pictures in Montgomery County; dancing, bowling, motion pictures, etc., permitted until 1:30 A.M. on Sunday.* * * *

§ 503. *Employees in connection with motion pictures in Montgomery County; penalty for violation of §§ 500 to 503.* * * *

§ 504. *Swimming pools in Montgomery.* * * *

§ 505. *Same—Officiating at or assisting in operation.* * * *

§ 506. *Recreation center, amusement park or picnic grounds in Montgomery County.* * * *

§ 507. *Same—Officiating at or assisting in conduct.* * * *

§ 508 (Supp. 1960). *Bowling, skating, etc., in Montgomery County.* * * *

§ 509. *Beaches, amusement parks, picnic groves, etc., in Anne Arundel County.* * * *

§ 510. *Same—Penalty.* * * *

§ 511. *Motion pictures in Town of Aberdeen.* * * *

§ 512. *Same—Penalty.* * * *

§ 513. *Motion pictures in Havre de Grace.* * * *

§ 514. *Sports, motion pictures, beaches and skating rinks in Harford County.* * * *

§ 515. *Motion pictures in certain districts in Anne Arundel County.* * * *

§ 516. (Supp. 1960). *Motion pictures, miniature golf courses, rod and gun clubs and swimming pools in Talbot County.* * * *

§ 517. *Bowling alleys, etc., in Allegany County.* * * *

§ 518 (Supp. 1960). *Bowling alleys, etc., in Baltimore County.* * * *

§ 519. *Motion pictures, bowling, etc., in Kent County.* * * *

§ 520. *Golf, baseball and stock car racing in Garrett County.* * * *

§ 521 (Supp. 1960). *Sale, etc., of merchandise on Sunday; exceptions.*

No person in this State shall sell, dispose of, barter, or deal in, or give away any articles of merchandise on Sunday, except retailers, who may sell and deliver on said day tobacco, cigars, cigarettes, candy, sodas and soft drinks, ice, ice cream, ices and other confectionery, milk, bread, fruits, gasoline, oils and greases; and any person violating any one of the provisions of this section shall be liable to indictment in any court in this State having criminal jurisdiction, and upon conviction thereof shall be fined a sum of not less than twenty nor more than fifty dollars, in the discretion of the court, for the first offense, and if convicted a second time for a violation of this section, the person or persons so offending shall be fined a sum not less than $50 nor more than $500, and be imprisoned for not less than 10 nor more than 30 days, in the discretion of the court, and his, her or their license, if any was issued, shall be declared null and void by the judge of said court; and it shall not be lawful for such person or persons to obtain another license for the period of twelve months from the time of such conviction, nor shall a license be obtained by any other person or persons to carry on said business on the premises or elsewhere, if the person, so as aforesaid convicted, has any interest whatever therein, or shall derive any profit whatever therefrom; and in case of being convicted more than twice for a violation of this section, such person or persons on each occasion shall be imprisoned for not less than thirty nor more than sixty days, and fined a sum not less than double that imposed on such person or persons on the last preceding conviction; and

his, her or their license, if any was issued, shall be declared null and void by the court, and no new license shall be issued to such person or persons for a period of two years from the time of such conviction, nor to any one else to carry on said business wherein he or she is in anywise interested, as before provided for the second violation of the provisions of this section; all the fines to be imposed under this section shall be paid to the State. This section is not to apply to apothecaries and such apothecaries may sell on Sunday drugs, medicines and patent medicines as on week days; and this section shall not apply to the sale of newspaper and periodicals.

§ 522. *Keeping open or using dancing saloon, opera house, tenpin alley, barber saloon or ball alley on Sunday.* It shall not be lawful to keep open or use any dancing saloon, opera house, tenpin alley, barber saloon or ball alley within this State on the Sabbath day, commonly called Sunday; and any person or persons, or body politic or corporate, who shall violate any provision of this section, or cause or knowingly permit the same to be violated by a person or persons in his, her or its employ shall be liable to indictment in any court of this State having criminal jurisdiction, and upon conviction thereof shall be fined a sum not less than fifty dollars nor more than one hundred dollars, in the discretion of the court, for the first offense; and if convicted a second time for a violation of this section, the person or persons, or body politic or corporate shall be fined a sum not less than one hundred nor more than five hundred dollars; and if a natural person shall be imprisoned, not less than ten nor more than thirty days in the discretion of the court; and in the case of any conviction or convictions under this section subsequent to the second, such person or persons, body politic or corporate shall be fined on each occasion a sum at least double that imposed upon him, her, them or it on the last preceding conviction; and if a natural person, shall be imprisoned not less than thirty nor more than sixty days in the discretion

of the court; all fines to be imposed under this section shall be paid to the State.

§ 523. *Motion pictures in Carroll County.* * * *

§ 524. *Bowling alleys, etc., in Carroll County.* * * *

§ 525. *Motion pictures in Town of Sykesville.* * * *

§ 526. *Motion pictures in Franklin district, Carroll County.* * * *

§ 527. *Motion pictures in Freedom district, Carroll County.* * * *

§ 528. *Baseball and motion pictures in Wicomico County.* * * *

§ 529. *Baseball and motion pictures in Worcester County.* * * *

§ 530. *Motion pictures in Allegany County outside corporate limits of municipalities.*

§531. *Motion pictures in towns of Centreville and Church Hill.* * * *

§ 532. *Motion pictures in Town of Mt. Airy.* * * *

§ 533. *Motion pictures in Caroline County.* * * *

§ 534. *Motion pictures in Town of Queenstown.* * * *

§ 534A (Supp. 1960). *Operation of sport facilities on Sunday in Queen Anne's County.* * * *

§ 534B (Supp. 1960). *Sports activities on Sunday in Howard County.* * * *

§ 534C (Supp. 1960). *Motion pictures on Sunday in City of Cambridge.*

Massachusetts

MASS. GEN. LAWS ANN. (1958) Chapter 136, §§ 1-32.

OBSERVANCE OF THE LORD'S DAY.

SECTION 1. [Lord's day, definition.] The Lord's day shall include the time from midnight to midnight.

SECTION 2. [Presence at games, sports, plays or public diversions on the Lord's day; exceptions.] Whoever on the Lord's day is present at a game, sport, play or public diversion, except a concert of sacred music, a public enter-

tainment duly licensed as provided in section four or a free open air concert given by a town, or by license of the mayor or the selectmen, upon a common or public park, street or square, or except a game of golf conducted on an open air golf course, or except a game of tennis or dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing, or except after one o'clock post-meridian a game of outdoor lawn bowling or the playing of golf or driving on an outdoor golf driving range or playing on a miniature golf course, so called, shall be punished by a fine of not more than five dollars. Whoever on the Lord's day takes part in any game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not more than fifty dollars. This and the following section shall not apply to amusement enterprises lawfully conducted under section four A or four B or to sports or games conducted in accordance with sections twenty-one to twenty-five, inclusive, in any city or town which accepts said sections or in accordance with sections twenty-six to thirty-two, inclusive, in any city or town in which said section twenty-six to thirty-two are then in force.

SECTION 3. [Establishing and maintaining public entertainment on the Lord's day.] Whoever offers to view, sets up, establishes, maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining any public entertainment on the Lord's day, except as provided in section two, unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four, or whoever on the Lord's day acts as proprietor, manager or person in charge of a game, sport, play or public diversion, except a public entertainment licensed under section four and except as provided in section two, shall be punished by a fine of not more than five hundred dollars.

SECTION 4. [License to hold public entertainment on the Lord's day; application; fee; suspension; revocation; hearing.] Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such terms or condition as they may prescribe, a license to hold on the Lord's day a public entertainment, including musical entertainment provided by mechanical or electrical means, in keeping with the character of the day and not inconsistent with its due observance, whether or not admission is to be obtained upon payment of money or other valuable consideration, and, if the proposed entertainment described in the application is solely for the exhibition of motion pictures, for the benefit of patrons in a public dining room or for the use of television, the use of radio, or musical entertainment provided by mechanical or electrical means, the mayor or selectmen may grant an annual license therefor; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. The application for the approval of the proposed entertainment by the commissioner shall be accompanied by a fee of two dollars, or, in the case of an application for the approval of an annual license, as herein provided, by a fee of fifty dollars. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. The foregoing provisions, insofar as they authorize any person to refuse to grant, or to suspend, revoke or annul a license upon the ground that the proposed entertainment is not in keeping with the character of the Lord's day or not consistent with its due observance, and insofar as they require written approval of the

proposed entertainment by said commissioner, shall not apply to any person making an application for a license to exhibit motion pictures or for the use of radio or television on said day, nor to any license issued upon such application.

SECTION 4A. [Maintenance and operation of enterprises at amusement parks, beaches or resorts on the Lord's day; licenses, suspension; revocation.] The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe, may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely:—Bowling alleys, shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre, photographic galleries or studios in which pictures are made and sold, games, and such amusement devices as may lawfully be operated therein on secular days; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed enterprise shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as provided in the case of public entertainments under section four. Any licensee hereunder may distribute premiums or prizes in connection with any game or device lawfully maintained and operated by him under authority hereof. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. So much of this section as relates to the maintenance and operation of bowling alleys not apply in any city or town which shall have accepted the provisions of section four B.

SECTION 4B. [License for operation of bowling alleys on the Lord's day.] In any city which accepts this section by vote of its city council and in any town which accepts this section by vote of its inhabitants, the city council, with the approval of the mayor, or the selectmen, as the case may be, may grant licenses for the operation of bowling alleys on the Lord's day between the hours of one and eleven post meridian; provided, that no such license may authorize the operation of bowling alleys on Easter, or on Christmas day if such day falls on the Lord's day. Every license granted hereunder shall specify the location of the place of business in which the license is to exercised, and the license shall not be valid in any other place. Bowling alleys operated under such licenses shall be operated subject to such regulations and restrictions as shall be prescribed from time to time by the city council, with the approval of the mayor, or by the selectmen. Said regulations and restrictions shall be stated in the license. Said licensing authorities may at any time and without previous notice revoke licenses issued under the section if they have reason to believe that any provisions of this section, or any regulation or restriction prescribed thereunder, is being or will be violated.

SECTION 5. [Keeping open shops or warehouses and conducting business or doing work on the Lord's day.] Whoever on the Lord's day keeps open his shop, warehouse or workshop, or does any manner of labor, business or work, except work of necessity and charity, shall be punished by a fine of not more than fifty dollars.

SECTION 6. [Limit of operation of section 5.] The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the

prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled

motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and

vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him.

SECTION 7. [Sale of frozen desserts, frozen dessert mix or confectionery on the Lord's day.] In Boston, and in any other city or town which accepts this section and section eight or has accepted corresponding provisions of earlier laws, in a city by its city council or in a town by the voters of the town at an annual town meeting, the licensing board or officer in such city or town, or if there is no such board or officer the aldermen of a city, or if there are no aldermen the city council with the approval of the mayor, or the selectmen of a town, may grant, to any reputable person who on secular days is a retail dealer in frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit and who does not hold a license for the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, a license to keep open his place of business on the Lord's day for the sale of frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit.

SECTION 8. [Provisions of licenses to sell frozen desserts, ice cream mix or confectionery on the Lord's day; fee; revocation.] Every license granted under the preceding section shall specify the street or place and the number, if any, or if there is no number, the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Such licenses shall expire on April thirtieth of each year; but they may be granted during April, to take effect on May first following. The fee for such license shall not be more than five dollars a year, and it may be suspended or revoked by the officer or board granting the same.

SECTION 9. [Permit for performance of necessary work or labor on the Lord's day.] The police commissioner of Boston, or any member of the police department having

a rank not lower than that of captain and designated by said commissioner, or the chief of police or other officer in charge of the police department of any other city or of any town, or the chairman of the board of selectmen of any town, upon such terms and conditions as he deems reasonable, may issue a permit for the performance on the Lord's day of necessary work or labor which in his judgment could not be performed on any other day without serious suffering, loss, damage or public inconvenience. Such permit shall cover not more than one day and shall not be issued more than six days prior to the day for which it is issued.

SECTION 10. [Parades with music on the Lord's day.] Any post or camp of an incorporated organization of veterans of any war in which the United States has engaged, or any incorporated civic or fraternal organization, may parade with music on the Lord's day for the purpose of attending divine service, holding commemorative exercises or dedicating memorials; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held.

SECTION 11. [Parades of policemen or firemen with music on certain Sundays.] Any company or association of policemen or firemen, whether in active service or former members of a police or fire department, may parade with music, in the case of policemen, on policemen's memorial day, the first Sunday of June in each year, and, in the case of firemen, on firemen's memorial day, the second Sunday of June in each year, for the special purpose of decorating the graves of deceased policemen or firemen, as the case may be; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held.

SECTION 12. [Entertainment of travelers or strangers in places of public entertainment.] Whoever, keeping a

house, shop, cellar or place of public entertainment or refreshment, entertains therein on the Lord's day any persons other than travelers, strangers or lodgers, or suffers such persons on said day to remain thereon or in the yards, orchards or fields appertaining thereto, drinking or spending their time idly or at play, or in doing any secular business, shall for a first offence be punished by a fine of not more than fifty dollars for each person so entertained or suffered so to remain; and for a subsequent offence by a fine of not more than one hundred dollars; and if convicted three times, he shall thereafter be disqualified to hold a license.

SECTION 13. [Service or execution of civil process on the Lord's day; service by publication.] A civil process shall not be served or executed on the Lord's day, and such service if made shall be void, and the person who serves or executes it shall be liable in damages to the person aggrieved in like manner as if he had no such process; provided, that this section shall not apply to service of such process by publication in a newspaper published on the Lord's day.

SECTION 14. [Rude or indecent behavior in houses of public worship.] Whoever on the Lord's day behaves rudely or indecently in any house of public worship shall be punished by a fine of not more than ten dollars.

SECTION 15. [Limitation of the commencement of prosecutions.] Prosecutions for penalties incurred under the preceding provisions of this chapter shall be commenced within six months after the offence was committed.

SECTION 16. [Inquiry into violations; enforcement.] Sheriffs, constables and grand jurors shall inquire into and inform of all violations of this chapter, and cause it to be enforced.

SECTION 17. [Discharging firearms and fishing on the Lord's day; discharge of firearms in shooting galleries or

at field trials.] Whoever on the Lord's day discharges any firearm for sport or in the pursuit of game, or attempts to take or catch any fish by using any net or spear, or attempts to take or catch any fish for commercial purposes by using a hook and line, shall be punished by a fine of not more than ten dollars; provided, that, on said day, shiners may be taken for bait by licensed fishermen, and eels and suckers may be taken with a spear. Prosecutions hereunder shall be commenced within thirty days after the offense was committed. This section shall not apply to the discharge of firearms in any shooting gallery licensed under section four A, or at any field trial licensed under section one hundred and twelve A of chapter one hundred and thirty-one, and subject to the restrictions therein imposed, nor shall it apply to the discharge of firearms, in trap, skeet or target shooting if carried on at such places within the limits of any city or town and during such hours as the city council or selectmen approve and in accordance with regulations which they are hereby authorized to establish.

SECTION 18. [Punishment of innholders permitting use of implements for gaming on the Lord's day.] Any innholder, common victualler or person keeping or suffering to be kept in any place occupied by him implements such as are used in gaming, in order that the same may for hire, gain or reward be used for purposes of amusement, who, on the Lord's day, uses or suffers to be used any such implements upon any part of his premises, shall for a first offence be punished by a fine of not more than one hundred dollars or by imprisonment for not more than three months; and for a subsequent offence by imprisonment for not more than one year; and in either case shall further recognize, with sufficient sureties, in a reasonable sum for his good behavior, and especially that he will not be guilty of any violation of this section for three months after the date of his recognizance.

SECTION 20. [Chapter as defense to action for tort or injury.] The provisions of this chapter shall not constitute a defence to an action for a tort or injury suffered by a person on the Lord's day.

CERTAIN SPORTS AND GAMES PERMITTED ON THE LORD'S DAY.

SECTION 21. [Athletic outdoor sports or games.] In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council, or in any town which accepts said sections by vote of its inhabitants, it shall be lawful on the Lord's day to take part in or witness any athletic outdoor sport or game, as hereinafter provided, between the hours of one thirty and six thirty post meridian and, in the case of a baseball game commenced before the hour of six thirty post meridian, for such further time beyond said hour as may be necessary to complete said game; provided, that said game had been scheduled to commence at or before the hour of three post meridian, or is the second of two successive games to be played on the same day, the first of which had been scheduled to commence at or before the hour of two post meridian. In any such city or town it shall be lawful on the Lord's day to take part in or witness, as hereinafter provided, any indoor hockey or basketball game between the hours of one thirty post meridian and twelve midnight.

SECTION 22. [Licensed playgrounds or parks for athletic outdoor sports or games.] Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public

playground or park, within one thousand feet of any regular place of worship.

SECTION 23. [Regulations and restrictions governing athletic outdoor sports or games; admission fees.] Such sports or games shall be conducted subject to such regulations and restrictions as shall be prescribed from time to time by the city council or the selectmen; provided, that they shall not prohibit the charging of admission fees or the taking of collections at any such sport or game, nor shall they prohibit the receiving of remuneration by any proprietor, manager or person in charge of any such sport or game or by any participant therein. Said regulations and restrictions shall be stated in the license or permit.

SECTION 24. [Revocation of permits.] The licensing authorities described in section twenty-two may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provisions of sections twenty-one to twenty-five, inclusive, or of any regulation or restriction prescribed under section twenty-three, is being or will be violated.

SECTION 25. [Outdoor exercises not involving element of contest.] Sections twenty-one to twenty-five, inclusive, shall not prohibit participation at other hours on the Lord's day in other outdoor exercise not involving the element of contest, nor shall they permit horse racing, automobile racing, boxing, or hunting with firearms.

SECTION 26. [Athletic outdoor sports or games not involving pecuniary reward, remuneration or consideration.] In any city or town wherein the corresponding provisions of this and the six following sections were in effect of the sixth day of December, nineteen hundred and twenty-eight, and which has not voted against said sections on resubmission as provided in section thirty-one, and has not accepted the provisions of sections twenty-one to twenty-five, inclusive, as provided in section twenty-one it shall be

lawful to take part in or witness any athletic outdoor sport or game, in which the contestants do not receive and have not been promised any pecuniary reward, remuneration or consideration whatsoever directly or indirectly in connection therewith, on the Lord's day between the hours of two and six in the afternoon as hereinafter provided.

SECTION 27. [Licensed playgrounds or parks for athletic outdoor sports or games not involving pecuniary award, remuneration or consideration.] Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

SECTION 28. [Regulations and restriction governing athletic outdoor sports or games not involving pecuniary reward, remuneration or consideration.] Such sports or games shall be conducted subject to such regulations and restrictions as shall be prescribed by the city council or selectmen, and the same shall be stated in the license or permit.

SECTION 29. [Admission fees.] No admission fee shall be charged directly or indirectly, and no business or other enterprise shall be conducted, and no collection shall be made at any such sport or game.

SECTION 30. [Revocation of permits.] The licensing authorities described in section twenty-seven may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provision of sections twenty-six to twenty-

nine, inclusive, or of any regulation or restriction prescribed under section twenty-eight; is being or will be violated.

SECTION 31. [Resubmission of sections 26 to 32 in cities or towns; petition.] In any city or town in which the provisions of sections twenty-six to thirty-two, inclusive, are in force, said sections shall be resubmitted to the voters at a municipal election, if a petition to that effect, signed by not less than ten per cent of the voters, is filed with the city or town clerk not less than thirty days before the election. If, upon such resubmission, a majority of the voters voting thereon vote against said sections, they shall cease to have effect in that city or town.

SECTION 32. [Outdoor exercises not involving element of contest.] Sections twenty-six to thirty-one, inclusive, shall not prohibit participation at other hours on the Lord's day in other outdoor exercises not involving the element of contest, nor shall they permit horse racing, automobile racing, boxing, or hunting with firearms.

Michigan

MICH. COMP. LAWS §§ 435.1-.8 (1948):

435.1 *Acts forbidden on Sunday; exceptions; penalty.*

SEC. 1. No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game or play on the first day of the week: The foregoing provisions shall not apply to works of necessity and charity nor to the making of mutual promises of marriage nor to the solemnization of marriages. And every person so offending shall be punished by fine not exceeding 10 dollars for each offense.

435.2 *Public houses, prohibited entertainment.*

Sec. 2. No tavern keeper, retailer of spirituous liquors, or other person keeping a house of public entertainment, shall entertain any persons, not being travelers, strangers or lodgers in his house, on the said first day of the week, or shall suffer any such persons on said day to abide or remain in his house, or in the buildings, yards or orchards or fields appertaining to the same, drinking or spending their time idly, or at play, or in doing any secular business.

435.3 *Same; penalty.*

Sec. 3. Every person offending against any of the provisions of the last preceding section, shall be punished by a fine not exceeding 5 dollars for each person so entertained, or suffered so to abide or remain; and upon any conviction after the first, such offender shall be punished by a fine not exceeding 10 dollars; and if convicted 3 times, he shall be afterwards incapable of holding a license; and every person so abiding or drinking shall be punished by a fine not exceeding 5 dollars.

435.4 *Presence at public diversion; prohibition, penalty.*

Sec. 4. No person shall be present at any game, sport, play or public diversion, or resort to any public assembly, excepting meetings for religious worship or moral instruction, or concerts of sacred music, upon the evening of the said first day of the week; and every person so offending shall be punished by a fine not exceeding 5 dollars for each offense.

435.7 *Persons observing seventh day of week, nonliability.*

Sec. 7. No person who conscientiously believes that the seventh day of the week ought to be observed as the sabbath, and actually refrains from secular business and labor on that day, shall be liable to the penalties provided in this chapter, for performing secular business or labor on the said first day of the week, provided he disturb no other person.

435.8 *Time included in first day of week; limitation on prosecution.*

Sec. 8. For the purposes of the provisions of this chapter, the said first day of the week shall be understood to include all the time between the midnight preceding and the midnight following the said day; and no prosecution for any fine or penalty incurred under any of the preceding provisions of this chapter, shall be commenced after the expiration of 3 months from the time when the offense shall have been committed.

Minnesota

MINN. STAT. ANN. §§ 614.28-31 (1947):

§ 614.27 *Preventing religious act*

Every person who, by threats or violence, shall wilfully prevent another person performing any lawful act enjoined upon or recommended to him by the religion which he professes shall be guilty of a misdemeanor.

§ 614.28 *Sabbath breaking; day*

The law prohibits the doing on the first day of the week of the certain acts specified in section 614.29, which are serious interruptions of the repose and religious liberty of the community, and the doing of any of such acts on that day shall constitute Sabbath breaking. Under the term "day," as used in this section and section 614.29, is included all the time from midnight to midnight.

§ 614.29 *Things prohibited; exceptions*

All horse racing, except horse racing at the annual fairs held by the various county agricultural societies of the state, gaming, and shows; all noises disturbing the peace of the day; all trades, manufacturers, and mechanical employments, except works of necessity performed in an orderly manner so as not to interfere with the repose and religious liberty of the community; all public selling or offering for

sale of property, and all other labor except works of necessity and charity are prohibited on the Sabbath day.

Meals to be served upon the premises or elsewhere by caterers, prepared tobacco in places other than where intoxicating liquors are kept for sale, fruits, confectionery, newspapers, drugs, medicines, and surgical appliances may be sold in a quiet and orderly manner. In works of necessity or charity is included whatever is needful during the day for good order, health, or comfort of the community, including the usual shoe-shining service; but keeping open a barber shop or shaving and hair-cutting shall not be deemed works of necessity or charity, and nothing in this section shall be construed to permit the selling of uncooked meats, groceries, clothing, boots, or shoes. The game of baseball when conducted in a quiet and orderly manner so as not to interfere with the peace, repose, and comfort of the community, may be played on the Sabbath day.

§ 614.30 *Punishment*

Every person who breaks the Sabbath shall be guilty of a misdemeanor and punished by a fine of not less than $1.00, nor more than $10.00, or by imprisonment in the county jail for not more than five days; but it shall be a sufficient defense to a prosecution for Sabbath breaking that the defendant uniformly keeps another day of the week as holy time and that the act complained of was done in such manner as not to disturb others in the observance of the Sabbath.

§ 614.31 *Service of process on the Sabbath prohibited*

Every service of legal process upon the Sabbath day, except in case of a breach or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime, or where such service is expressly authorized by statute, is hereby prohibited.

Mississippi

MISS. CODE ANN. §§ 2368-71 (1956):

§ 2368. *Sabbath, violations of, generally.*

If any person on the first day of the week, commonly called Sunday, shall himself labor at his own or any other trade, calling or business, or shall employ his apprentice or servant in labor or other business, except it be in the ordinary household offices of daily necessity or other work of necessity or charity, or other activity hereinafter expressly excepted, he shall, on conviction, be fined not more than twenty dollars ($20.00) for every offense, but nothing in this section shall apply to labor on railroads or steamboats, common and contract carriers by motor vehicles, telegraph or telephone lines, street railways, newspapers or in the business of a livery stable, garage or gasoline stations, or ice house, or to the manufacturing operation of any person, firm or corporation engaged in a manufacturing activity, which for economical operation must engage in a continuous manufacturing process; and in municipalities of less than five thousand (5,000) inhabitants, meat markets; and nothing in this section shall prohibit churches or religious societies or their officers, agents and employees from transacting any business, or performing any action on the first day of the week, commonly called Sunday, which they may transact or do on any other day of the week, including but not limited to, the formation of corporations, the execution of deeds, deeds of trust and notes, oil, gas and mineral leases and the issuance of bonds. All such business and actions heretofore transacted or performed on the first day of the week, commonly called Sunday, by churches, religious societies, and their officers, agents and employees acting as such, shall never be declared invalid because transacted or performed on Sunday. Provided, however, that municipalities may by ordinance prescribe certain hours, said hours not to exceed three (3) hours per Sabbath that garages and gasoline stations within the limits of said municipality shall remain closed.

§ 2369. *Sabbath—merchants, other than druggists, not to open store.*

A merchant, shop-keeper, or other person shall not keep open store, or dispose of any wares or merchandise, goods, or chattels, on Sunday, or sell or barter the same; and every person so offending shall, on conviction, be fined not more than twenty dollars for every such offense; but this shall not apply to apothecaries or druggists who may open their stores for the sale of medicine.

§ 2370. *Sabbath—farces, plays, games.*

If any person shall engage in, show forth, exhibit, act, represent, perform, or cause to be shown forth, acted, represented or performed, any tricks, juggling, sleight of hand, or any bearbaiting, any bull-fighting, horse-racing, or cock-fighting, or any such like show or exhibit, on Sunday, every person so offending shall be fined not more than fifty dollars ($50.00): Provided, that this section shall not be construed to prohibit the showing of moving picture shows, baseball, football, basketball, tennis and golf games, between the hours of 1:00 o'clock p.m. and 6:00 o'clock p.m. on Sundays, or the operation of a movie wherein motion pictures are shown between the hours of 9:00 o'clock p.m. and 12:00 o'clock p.m. on Sunday.

§ 2370.5. *Same—local option.*

The showing of moving picture shows and plays, and baseball, football, basket ball, tennis, golf, and similar forms of entertainment and recreation, between the hours of 1:00 o'clock p.m. and 6:00 o'clock p.m. on Sunday is legal.

Provided, however, that upon the petition of 20% of the qualified electors in any municipality so requesting, the governing authorities thereof, shall call an election within thirty days after the filing of said petition, to determine whether the provisions of the preceding paragraph of this section shall be inapplicable within that municipality, . . .

§ 2371. *Sabbath—hunting or fisking.*

If any person shall hunt with a gun or with dogs, or fish in any way on Sunday, he shall, on conviction, be fined not less than five dollars nor more than twenty dollars.

Missouri

MO. ANN. STAT. §§ 563.690-730 (1949):

§ 563.690. *Sabbath breaking*

Every person who shall either labor himself, or compel or permit his apprentice or servant, or any other person under his charge or control, to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of hunting game or shooting on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.

§ 563.700. *"Sabbath breaking" construed*

Section 563.690 shall not extend to any person who is a member of a religious society by whom any other than the first day of the week is observed as a Sabbath, so that he observes such Sabbath, nor to prohibit any ferryman from crossing passengers on any day of the week; nor shall said section be extended or construed to be an excuse or defense in any suit for the recovery of damages or penalties from any person, company or corporation voluntarily contracting or engaging in business on Sunday.

§ 563.710. *Horse racing on Sunday*

Every person who shall be convicted of horse racing, cock-fighting, or playing at cards or games of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.

§ 563.720. *Selling goods on Sunday*

Every person who shall expose to sale any goods, wares or merchandise, or shall keep open any ale or porter house, grocery or tippling shop, or shall sell or retail any fermented or distilled liquor on the first day of the week, commonly called Sunday, shall, on conviction, be adjudged guilty of a misdemeanor and fined not exceeding fifty dollars.

§ 563.730. *Section 563.720 construed*

Section 563.720 shall not be construed to prevent the sale of any drugs or medicines, provisions or other articles of immediate necessity.

Montana

MONTANA REV. CODE (1947) Sec. 94-35-216:

Sunday—certain activities on, forbidden. Every person who on Sunday, or the first day of the week, keeps open or maintains or who aids in opening or maintaining any dance-hall, dance-house, racetrack, gambling-house or pool-room, variety hall, or any other place of amusement where any intoxicating liquors are sold or dispensed, is guilty of a misdemeanor; provided, however, that the provisions of this section shall not apply to such dining-halls or pavilions as are maintained or conducted in public parks or playgrounds where no admission is charged, and where good order is maintained and where no intoxicating liquors are sold.

Nebraska

NEB. REV. STAT. (1956) §§ 15-258, 16-226, 17-128, 28-940:

15-258. *Billiard halls; disorderly houses; desecration of Sabbath.* A primary city may restrain, prohibit, and suppress unlicensed tippling shops, billiard tables, bowling alleys, houses of prostitution, opium joints, dens, and other disorderly houses and practices, games, gambling houses,

desecration of the Sabbath day, commonly called Sunday, and may prohibit all public amusements, shows, exhibitions or ordinary business pursuits upon said day, all lotteries and fraudulent devices and practices for the purposes of obtaining money or property, all shooting galleries, and all kinds of public indecencies.

16-226. *Billiard halls; bowling alleys; disorderly houses, gambling, and desecration of Sabbath.* A city of the first class by ordinance may regulate, prohibit, and suppress unlicensed tippling shops, billiard tables and bowling alleys; restrain houses of prostitution, opium joints, dens and other disorderly houses and practices, games and gambling houses, desecration of the Sabbath day, commonly called Sunday; and prohibit all public amusements, shows, exhibitions or ordinary business pursuits upon said day, all lotteries or fraudulent devices and practices for the purpose of obtaining money or property, all shooting galleries, and all kinds of public indecencies.

17-128. *Sunday; business and amusements; regulation.* A second-class city shall have power to prevent any desecration of the Sabbath day, commonly called Sunday, and to prohibit public amusements, shows, exhibitions or ordinary business pursuits upon said day.

28-940. *Sabbath observance; baseball, public dancing prohibited; exceptions.* If any person of the age of fourteen years or upwards shall be found on the first day of the week commonly called Sunday, rioting, quarreling or engaged in public dancing, he or she shall be fined in a sum not exceeding twenty dollars or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. If any person of the age of fourteen years or upwards shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted) he or she shall be fined in a sum not exceeding five dollars nor less than one dollar; *Provided*, the provisions of this section relating to public dancing shall

not apply to cities and villages in which public dancing is supervised and regulated by the municipal authorities, nor to rural territory in any county beyond the corporate limits of any city or village therein where public dancing is supervised and regulated by a special deputy sheriff, assigned by the sheriff of the county to such rural dance hall for the purpose of supervising the same. Such deputy sheriff, so assigned, shall give bond in the sum of three thousand dollars, such bond to run to the county, for the benefit of the county or any person, firm or corporation who may suffer injury or loss on account of the negligence or the unlawful act or acts of such deputy sheriff, and conditioned upon the faithful performance of his duties as supervisor of the rural dance hall to which he is assigned; and such deputy sheriff shall be paid a reasonable sum for his services of supervision or regulation by the proprietor of the rural dance hall to which he is assigned; *Provided*, that no deputy sheriff so assigned shall be the proprietor of such rural dance hall, his employee or relative, nor shall such deputy sheriff be any person financially interested, directly or indirectly in the operation of such rural dance hall. Nothing herein contained in relation to common labor on the day of the week commonly called Sunday, shall be construed to extend to those who conscientiously do observe the seventh day of the week on the Sabbath, nor prevent emigrating families from traveling, watermen from landing their passengers, and superintendents and helpers of toll bridges or toll gates from attending and superintending the same, or ferrymen from conveying travelers over the water, or persons moving their families on such days, or to prevent railway companies from running necessary trains. It shall be unlawful for any person over fourteen years of age to play baseball in a competitive game on Sunday in this state, except on the conditions following: In all cities and villages such games may be authorized by a vote of the majority of the electors of such city or village, voting at a general or special election for that purpose; and in the several counties of the state,

outside of the corporate limits of the cities and villages therein, such games may be authorized by the county board, and the authority therefor shall be in the form of a resolution duly passed by the county board. Any person over the age of fourteen years, who shall engage in playing baseball on Sunday in a competitive game, where authority therefor has not been granted as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not to exceed twenty-five dollars for each and every offense; and shall stand committed until such fine and costs are paid.

Nevada

NEVADA REV. STAT. (1957) Sec. 201.260:

Sabbath breaking. Every person who, on a Sunday, shall promote or engage in any noisy or boisterous sport or amusement, which disturbs the peace of the day, or shall keep open any race grounds, shall be guilty of a misdemeanor.

New Hampshire

N. H. REV. STAT. ANN. c. 578, §§ 578.3-.13 (1955):

§ 578.3 *Sunday Work.* No person shall do any work, business, or labor of his secular calling, to the disturbance of others, on the first day of the week, commonly called the Lord's day, except works of necessity and mercy, and the making of necessary repairs upon mills and factories which could not be made otherwise without loss to operatives; and no person shall engage in any play, game, or sport on that day.

§ 578.4 *Sunday-Sales, etc.* No person shall keep his shop, warehouse, cellar, restaurant, or workshop open for the reception of company, or shall sell or expose for sale any merchandise whatever on the Lord's day; but this section shall not be construed to prevent the entertainment of

boarders, nor the sale of milk, bread, and other necessaries of life, nor of drugs and medicines.

§578.5 *Exceptions.* Nothing in this chapter shall prevent the selectmen of any town, or the city council of any city, from adopting by-laws and ordinances permitting and regulating retail business, plays, games, sports, and exhibitions on the Lord's Day, provided such by-laws and ordinances are approved by a majority vote of the legal voters present and voting at the next regular election. But no such by-laws or ordinances shall permit public dancing, horse racing, or prize fights at any time on the Lord's Day, or the games of baseball, hockey, or football, or any games, sports, or exhibitions of physical skill at which admission is charged or donations accepted, to be held earlier than one o'clock in the afternoon, or the opening of theatrical or vaudeville performances or motion pictures earlier than two o'clock in the afternoon.

§ 578.6 *Disturbing Services.* No person shall, on the Lord's day, within the walls of any house of public worship or near the same, behave rudely or indecently, either in the time of public service, or between the forenoon and afternoon services.

§ 578.10 *Penalty.* If any person shall be guilty of a breach of any provision of this chapter he shall be fined not more than ten dollars, or imprisoned not more than thirty days, or both, unless otherwise specially provided, and he may be required to give sureties to be of good behavior for one year.

§578.11 *Arrests.* Any person, upon view of any offense described in this chapter, may apprehend the offender, and bring him before a justice for trial.

578.13 *Limitation of Prosecution.* No prosecution for the violation of any provision of this chapter shall be sustained unless begun within thirty days after the commission of the offense.

New Jersey

N. J. REV. STAT. §§ 2A:171-1 to -12 (1953), as amended (Supp. 1959):

§ 2A:171-1. *Worldly employment or business prohibited*

No worldly employment or business, except works of necessity and charity, shall be performed or practiced by any person within this state on the Christian Sabbath, or first day of the week, commonly called and hereinafter designated as Sunday.

§ 2A:171-1.1 (Supp. 1959). *Buying, selling and trading motor vehicles on Sunday*

Any person who shall carry on or engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles; or who shall open any place of business or lot wherein he attempts to or does engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles; or who does buy, sell, exchange, deal or trade in new or used motor vehicles as a business on the first day of the week, commonly known and designated as Sunday is a disorderly person. Such a disorderly person upon conviction for the first offense shall pay a fine not to exceed $100.00 or be imprisoned for a period of not more than 10 days or both; and for the second offense shall pay a fine not to exceed $500.00 or be imprisoned for a period not more than 30 days or both; and for the third or each subsequent offense shall pay a fine of $750.00 or be imprisoned for a period of 6 months or both. If the person is a licensed dealer in new or used motor vehicles in this State, under the provisions of chapter 10, Title 39 of the Revised Statutes, such person shall also be subject to suspension or revocation of his dealer's license to engage in the business of buying, selling or dealing in motor vehicles in this State as provided in Title 39, chapter 10, section 20, for violation of this statute.

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§ 2A:171-2 (Supp. 1959). *Preparation and sale of foods and drugs permitted*

Nothing contained in this chapter shall be construed to prohibit the preparation and sale of drugs, meals, prepared food, perishable agricultural and horticultural products and nonalcoholic beverages on Sunday nor to apply to sales of alcoholic beverages which are otherwise subject to regulation under Title 33 of the Revised Statutes.

§ 2A:171-3. *Service of civil process prohibited; civil liability of server*

Except as otherwise provided by law, no person shall serve or execute, or cause to be served or executed, on Sunday, any writ, process, warrant, order or judgment, except in criminal cases or for breach of the peace. The service of every such writ, process, warrant, order or judgment shall be void, and the person so serving or executing it shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he had done the same without any writ, process, warrant, order or judgment.

§ 2A:171-4. *Immunity from prosecutions under certain circumstances and conditions*

If any person charged with having labored or worked on Sunday shall prove to the satisfaction of the court that he uniformly keeps the seventh day of the week as the Sabbath, habitually abstains on that day from following his usual occupation or business and from all recreation, and devotes the day to the exercise of religious worship, and if the work or labor for which such person is informed against was done and performed in his dwelling house or workship, or on his premises, and has not disturbed other persons in the observance of the first day of the week as the Sabbath, then the defendant shall be discharged. This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares, merchandise or other article or thing in the line of his business or occupation.

§ 2A:171-5. *Immunity from answering process and from performing certain duties*

Every inhabitant of this state who religiously observes the seventh day of the week as the Sabbath shall be exempt from answering to any judicial process, either as defendant, witness or juror, except in criminal cases, and from executing on that day the duties of any post or office to which he is appointed or commissioned, except when the interests of the state may absolutely require it; and he shall also be exempt from doing any militia duty on that day, except when in actual service.

§ 2A:171-5.1 (Supp. 1959). *Retail, wholesale or auction sale of certain articles on Sunday prohibited*

On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person whether it be at retail, wholesale or by auction, to sell, attempt to sell or offer to sell or to engage in the business of selling, as hereinafter defined, clothing or wearing apparel, building and lumber supply materials, furniture, home or business or office furnishings, household, business or office appliances.

Any person who violates any provision of this act is a disorderly person and upon conviction for the first offense shall pay a fine of $25.00; and for the second offense shall pay a fine of $100.00; and for the third offense shall pay a fine of $200.00 or be imprisoned for a period of not more than 30 days or both; and for the fourth or each subsequent offense be imprisoned for a period of not less than 30 days nor more than 6 months. A single sale of an article of merchandise to any 1 customer or a single offer to sell an article of merchandise to any 1 prospective customer, shall be deemed to be and constitute a separate and distinct violation of this act.

§ 2A:171-5.2 (Supp. 1959). *Additional penalties; nuisance*

In addition to the penalties hereinabove provided in case of conviction under section 1 of this act [Section 2A:171-

5.1], upon any 4 convictions for violations of this act, the premises in or upon which the violation occurred shall be deemed a nuisance and the owners, tenants and occupants of such premises shall be liable for the penalties and additional penalties provided for the maintenance of nuisances as set forth in section 2A:130 et seq. of the New Jersey Statutes.

§ 2A:171-5.3 (Supp. 1959). *Definitions.* • • •

§ 2A:171-5.4 (Supp. 1959). *Construction of act as additional remedy; liability for acts of corporation*

This act shall be construed as an additional remedy to secure proper Sunday observance and the directors, officers, managers, agents or employees of corporations shall be personally liable for the penalties hereinabove provided as well as the stockholders and corporate owners of the business in respect to which violations occur.

§ 2A:171-5.5 (Supp. 1959). *Applicability to counties bordering ocean having less than 225,000 population*

The provisions of this act shall be inapplicable to counties bordering on the Atlantic ocean having a population of less than 225,000.

§ 2A:171-5.6. *Severability*

The provisions of this act shall not be severable and if any phrase, clause, sentence or provision of this act is declared unconstitutional or the applicability thereof to any person is held invalid, the remainder of this act and the act as a whole shall be unconstitutional.

§ 2A:171-5.7 (Supp. 1959). *Exclusion of invalid phrase, clause, section or part*

If any phrase, clause, section or part of this act shall be determined to be invalid in a court of competent jurisdiction, such part shall be excluded and the rest of the act shall be valid and effectual.

ARTICLE 1A (Supp. 1959) ACTS PROHIBITED: REFERENDUM

§ 2A:171-5.8. *Retail, wholesale or auction sale of certain articles on Sunday prohibited; violators as disorderly persons; penalties*

On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person whether it be at retail, wholesale or by auction, to sell, attempt to sell or offer to sell or to engage in the business of selling, as hereinafter defined, clothing or wearing apparel, building and lumber supply materials, furniture, home or business or office furnishings, household, business or office appliances, except as works of necessity and charity or as isolated transactions not in the usual course of the business of the participants.

Any person who violates any provision of this act is a disorderly person and upon conviction for the first offense, shall pay a fine of $25.00; and for the second offense, shall pay a fine of not less than $25.00 or more than $100.00 to be fixed by the court; and for the third offense, shall pay a fine of not less than $100.00 or more than $200.00 to be fixed by the court or, in the discretion of the court, may be imprisoned for a period of not more than 30 days, or both; and for the fourth or each subsequent offense, shall pay a fine of not less than $200.00 or more than $500.00 to be fixed by the court or, in the discretion of the court, may be imprisoned for a period of not less than 30 days or more than 6 months, or both. A single sale of an article or articles of merchandise of the character hereinabove set forth to any 1 customer, or a single offer to sell an article or articles of such merchandise to any 1 prospective customer, shall be deemed to be and constitute a separate and distinct violation of this act.

§ 2A:171-5.9. *Additional penalties; nuisance*

In addition to the penalties hereinabove provided in case of conviction under section 1 of this act [Section 2A:171-5.8], upon any 4 convictions for violations of this act, the

premises in or upon which the violation occurred shall be deemed a nuisance.

§ 2A:171-5.10. *Definitions* * * *

§ 2A:171-5.11. *Additional remedy; liability of corporate officers and employees*

This act shall be construed as an additional remedy to secure proper Sunday observance and the directors, officers, managers, agents or employees of corporations shall be personally liable for the penalties hereinabove provided.

§ 2A:171-5.12. *Effective date; operative in counties upon adoption by voters; referendum*

This act shall take effect immediately but shall not become operative in any county unless and until the voters of the county shall determine by referendum held pursuant to this act that the same shall apply therein.

§ 2A:171-5.13. *Petition for county referendum* * * *

§ 2A:171-5.14. *Ballot; form of question* * * *

-5.15. *Majority vote* * * *

-5.15. *Resubmission of question after approval* * * *

-5.17. *Resubmission of question after defeat of proposal* * * *

-5.18. *Time for resubmission* * * *

ARTICLE 2 (1953). ACTS ALLOWED; REFERENDUM

§ 2A:171-6. *Certain occupations and recreations, sports and amusements allowed; municipal control and regulation*

Upon the adoption of this article by the legal voters as hereinafter provided, any person may, on Sunday: (a) print, publish and sell newspapers, (b) sell and deliver milk, (c) walk, ride or drive for recreation, (d) hire conveyances for riding and driving, or (e) engage or take part in any form of recreation, sport or amusement that is not unlawful on other days of the week, if in so doing such person does not disturb others in their observance of Sunday.

The governing body of a municipality or incorporated camp meeting association of this state may, however, adopt such ordinances or rules as it deems necessary and proper to control and regulate the conduct of the forms of recreation, sports or amusements made lawful by this section, and to control, regulate or restrict the commercialization of any such form or forms of recreation, sport or amusement, within its respective boundaries, and prescribe fines and penalties for their violation, which shall be enforced and collected in the same manner as is provided by law for the violation of other ordinances and rules of such municipality or association.

§ 2A:171-7. *Petition for submission; signatures; filing with municipal clerk; notice of submission* • • •

§ 2A:171-8. *Ballots; statement of question* • • •

§ 2A:171-9. *Special ballots for use at primary election by certain voters* • • •

§ 2A:171-10. *Deposit and counting of special ballots* • • •

§ 2A:171-11. *Return and canvass of ballots; declaration of result of election* • • •

§ 2A:171-12. *Adoption of question submitted* • • •

New Mexico

N. M. STAT. ANN. §§ 40-44-1 to -5 (1953):

§ 40-44-1. *Sunday—Hours designated.*—Sunday for the purpose of this article, shall be regarded as the time between 11:59 p.m. of Saturday and 12:00 p.m. Sunday.

§ 40-44-2. *Activities prohibited—Exceptions—Penalty.*—Any person or persons who shall be found on the first day of the week, called Sunday, engaged in any sports, or in horse racing, cock fighting, or in any other manner disturbing any worshipping assembly, or private family, or attending any public meeting, or public exhibition, excepting for religious worship or instruction, or engaged in any labor, except

works of necessity, charity or mercy, shall be punished by a fine not exceeding fifteen dollars [$15.00], nor less than five dollars [$5.00], or imprisonment in the county jail of not more than fifteen [15] days, nor less than five [5] days, in the discretion of the court upon conviction before any district court.

§ 40-44.3. *Exceptions—Labor allowed on Sunday—Limiting power of municipality.*—It shall be lawful in cases of necessity for farmers and gardeners to irrigate their lands and when necessary to preserve the same, to remove grain and other products from the fields on said day; and it shall be lawful for cooks, waiters and other employees of hotels and restaurants, and butchers and bakers to perform their duties on said day; and it shall be lawful for any person to operate any drug store, filling station, camp ground, news stand, picture show, garage, tire repairing shop, ice station, confectionery, soft drink stand, truck and stage line, and all works or enterprises of necessity on said day.

No municipality or the governing body thereof shall enact or enforce any ordinance in conflict with the provisions of this section.

§ 40-44.4. *Fees of state witnesses.* • • •

§ 40-44.5. *Prosecution for violation of Sunday laws.*—It is hereby made the duty of the attorney general and district attorneys, to prosecute offenders against the provisions of this article.

New York

N. Y. Penal Law §§ 2140-2152:

§ 2140. *The Sabbath*

The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community.

§ 2141. *Sabbath breaking*

A violation of the foregoing prohibition is Sabbath breaking.

§ 2142 (Supp. 1960). *Punishment for Sabbath breaking*

Sabbath breaking is a misdemeanor, punishable by a fine not less than five dollars and not more than ten dollars, or by imprisonment in a county jail not exceeding five days, or by both, but for a second or other offense, where the party shall have been previously convicted, it shall be punishable by a fine not less than ten dollars and not more than twenty dollars, or by imprisonment in a county jail not less than five nor more than twenty days, or both.

§ 2143. *Labor prohibited on Sunday*

All labor on Sunday is prohibited, excepting the works of necessity and charity. In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community.

§ 2144. *Persons observing another day as a Sabbath*

It is a sufficient defense to a prosecution for work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

§ 2145 (Supp. 1959). *Public sports and exercises on Sunday*

All public sports, exercises or shows, upon the first day of the week, and all noise unreasonably disturbing the peace of the day are prohibited, except as hereinafter provided.

Notwithstanding the provisions of this section, it shall be lawful to conduct, witness, participate or engage in any form of public sports, exercises or shows which are conducted or engaged in primarily for the entertainment of spectators, not specifically prohibited by any provision of

law, on the first day of the week after two o'clock in the afternoon, to witness which the public is invited or an admission fee is charged, either directly or indirectly, in a city, town or village as shall be permitted by a local law or ordinance heretofore or hereafter adopted by the common council or other legislative body of the city, town or village permitting such public sports, exercises or shows on such day and after such hour.

Nothing herein contained shall be deemed to prohibit private sports, games or recreational activities which are engaged in primarily for the personal enjoyment, recreation and health of the participants, on the first day of the week, conducted in a manner which does not constitute a serious interruption of the repose or religious liberty of the community. As amended L. 1949, c. 655; L. 1952, c. 301, § 1, eff. March 28, 1952.

§ 2146. *Trades, manufactures, and mechanical employments prohibited on Sunday*

All trades, manufactures, agricultural or mechanical employments upon the first day of the week are prohibited, except that when the same are works of necessity they may be performed on that day in their usual and orderly manner, so as not to interfere with the repose and religious liberty of the community.

§ 2147 (Supp. 1959). *Public traffic on Sunday*

All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows:

1. Articles of food may be sold, served, supplied and delivered at any time before ten o'clock in the morning;

2. Meals may be sold to be eaten on the premises where sold at any time of the day;

3. Caterers may serve meals to their patrons at any time of the day;

4. Prepared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souvenirs, newspapers, magazines, gasoline, oil, tires, cemetery monuments, drugs, medicine and surgical instruments may be sold and may be delivered at any time of the day;

5. Grocers, delicatessen dealers and bakeries may sell, supply, serve and deliver cooked and prepared foods, between the hours of four o'clock in the afternoon and half past seven o'clock in the evening, in addition to the time provided for in subdivision one hereof, and, elsewhere than in cities and villages having a population of forty thousand or more, delicatessen dealers, bakeries and farmers' markets or roadside stands selling fresh vegetables and other farm produce, and fishing tackle and bait stores may sell, supply, serve and deliver merchandise usually sold by them, at any time of the day.

6. Persons, firms or corporations holding licenses and/or permits issued under the provisions of the alcoholic beverage control law permitting the sale of beer at retail, may sell such beverages at retail on Sunday before three antemeridian and after one postmeridian for off-premises consumption to persons making purchases at the licensed premises to be taken by them from the licensed premises.

The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods; or meats, fresh or salt, at any hour or time of the day. Delicatessen dealers shall not be considered as caterers within subdivision three hereof.

* * * * * * * * * * *

§ 2149. *Forfeiture of commodities exposed for sale on Sunday*

In addition to the penalty imposed by section twenty-one hundred and forty-two, all property and commodities exposed for sale on the first day of the week in violation of the provisions of this article shall be forfeited. Upon conviction of the offender by a justice of the peace of a county, or by

any police justice or magistrate, such officer shall issue a warrant for the seizure of the forfeited articles, which, when seized, shall be sold on one day's notice, and the proceeds paid to the overseers of the poor, for the use of the poor of the town or city.

§ 2150. *Maliciously serving process on Saturday on persons who keeps Saturday as holy time*

Whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.

§ 2151 (Supp. 1959). *Processions and parades on Sunday*

All processions and parades on Sunday in any city, excepting only funeral processions for the actual burial of the dead, and processions to and from a place of worship in connection with a religious service there celebrated, are forbidden; and in such excepted cases there shall be no music, fireworks, discharge of cannon or firearms, or other disturbing noise. At a military funeral, or at the funeral of a United States soldier, sailor or marine, or of a national guardsman, or of a deceased member of an association of veteran soldiers, sailors or marines, or of a disbanded militia regiment, or of a secret fraternal society, or of an association of employees of the national, state, or municipal governments, music may be played while escorting the body; also in patriotic military processions on Sunday previous to Decoration day, known as Memorial Sunday, to cemeteries or other places where memorial services are held, and also by organizations of the national guard or naval militia or of an association of employees of the national, state, or municipal governments, attending religious service on Sunday; but in no case within one block of a place of worship where service is then being celebrated. Music may also be

played in any procession conducted by a religious organization or society in connection with a religious service or religious rally after one o'clock noon on Sunday.

Notwithstanding the provision of this section, it shall be lawful to conduct, witness, participate or engage in processions or parades and to play music in any such procession or parade on Sunday after two o'clock in the afternoon, in a city, town or village, as shall be permitted by a local law or ordinance heretofore or hereafter adopted by the common council or other legislative body of a city, town or village permitting such processions and parades on such day and after such hour. A person wilfully violating any provision of this section is punishable by a fine not exceeding twenty dollars or imprisonment not exceeding ten days, or by both.

§ 2152 (Supp. 1959). *Public entertainment on Sunday*

All legitimate theatrical performances, concert and recital dances, motion picture exhibitions, or other public exhibitions, exhibits, shows or entertainment on the first day of the week are prohibited, except as hereinafter provided.

Notwithstanding the provisions of this section, or of any general or local act, it shall be lawful to conduct or participate in any public entertainment on the first day of the week after two o'clock in the afternoon, to witness which the public is invited or an admission fee is charged, either directly or indirectly, in a city, town or village as shall be permitted, by a local law or ordinance heretofore or hereafter adopted by the common council or other legislative body of the city, town or village, permitting the same on such day and after such hour. If in any city, town or village concert or recital dances, motion pictures or legitimate theatrical productions are now exhibited on the first day of the week, they may continue to be so exhibited during such times as the exhibition of such dances, pictures, productions and performances shall not have been prohibited by a local law or ordinance heretofore or hereafter adopted by the common council or other legislative body of such city, town or village.

North Carolina

NORTH CAROLINA GEN STAT. (1958) § 103.2:

Hunting on Sunday.—If any person shall, except in defense of his own property, hunt on Sunday having with him a shot gun, rifle, or pistol, he shall be guilty of a misdemeanor and pay a fine not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days.

North Dakota

N. D. REV. CODE §§ 12-2114 to -2122 (1943), as amended (Supp. 1957), as amended, N. D. Laws 1959, ch. 131, p. 237:

12-2114. *Day in "First Day of Week" Defined.* Under the term "day", as employed in the phrase "first day of the week", in the following section, is included all the time from midnight to midnight.

12-2115 (Supp. 1957). *Acts of Sabbath Breaking.* The first day of the week being by general consent set apart for rest and religious uses, the following acts are forbidden to be done on that day, the doing of any of which is Sabbath breaking:

1. Servile labor, except work of necessity and charity. The operation of steam railroads, street railways, telegraph and telephone systems, electric light, gas, heat and power systems, livery and feed barns, taxicabs, and busses, automobile garages and filling stations, bakeries, bootblack stands, popcorn stands, and newspaper plants shall be deemed works of necessity;

2. Public sports, including shooting, sporting horse racing, or other public sports, circuses, and street carnivals. This section shall not apply to baseball when authorized by the governing body of any municipality to be played within the territorial limits of such municipality or by the board of county commissioners when played outside the limits of cities or villages and when conducted in a quiet and orderly

manner so as not to interfere with the peace, repose, and comfort of the community and when played after one o'clock p.m. on the Sabbath day more than five hundred feet away from any church edifice;

3. Trades, manufactures, and mechanical employments;

4. All manner of public selling, or offering or exposing for sale publicly, of any commodity, except that meats and fish may be sold at any time before 10 o'clock a.m., and foods may be sold to be eaten upon the premises where sold, and drugs, medicines, surgical appliances, milk, ice cream and soda fountain dispensations, fruits, candy and confectionery, tobacco and cigars, newspapers and magazines may be sold at any time of the day. None of said articles or commodities shall be sold in any billiard hall, pool hall, bowling alley, saloon, or any other place where gaming of any kind is conducted unless said gaming is discontinued from 12 o'clock midnight on Saturday until 6 o'clock a.m. on Monday; and

5. Service of legal process of any description, except in cases of breach of the peace or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime, or when the service is specially authorized by law.

12-2116. *Sabbath Breaking; Punishment.* Every person guilty of Sabbath breaking shall be punished by a fine of not less than one dollar nor more than fifty dollars, or by imprisonment in the county jail for not less than one day nor more than twenty days, or by both such fine and imprisonment.

12-2117. *Servile Labor; Observing Other Day Defense.* It is a sufficient defense in prosecutions for performing servile labor on the first day of the week to show that the accused uniformly keeps another day of the week as holy time and does not labor upon that day, and that the labor complained of was done in such manner as not to interrupt or disturb

other persons in observing the first day of the week as holy time.

12-2118. *Maliciously Serving or Procuring Service of Process or Trial on Holy Day Misdemeanor.* Whoever maliciously procures any process in a civil action to be served on Saturday upon any person who keeps Saturday as holy time and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.

12-2119. *Sunday Dances Prohibited; Punishment.* No person shall keep open, run, or permit the running of any place for public dancing, or permit the use of any place for public dancing between the hours of 12 o'clock midnight on Saturday and sunrise the following Monday morning. Any person violating the provisions of this section is guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than fifty dollars for each offense.

12-2120 (as amended, N. D. Laws 1959, c. 131, p. 23). *Operation of Theaters and Movies on Sunday Lawful.* The operation of theaters showing motion pictures and other theatrical performances for profit or otherwise after 1.15 o'clock p.m. on Sunday is lawful.

12-2121. *Bowling Permitted on First Day of Week; When.* Any licensed bowling alley in the state may be operated from and after one o'clock p.m. on the first day of the week, and all necessary labor performed and service rendered in connection therewith is legal and lawful. Any municipality, by ordinance, may prohibit the operating of bowling alleys on the first day of the week.

12-2122. *Operating Bathhouses and Pleasure Boats on Sunday Lawful.* It shall be lawful for chautauqua associations, summer resorts, firms, corporations, and private persons to operate bathhouses, bathing beaches, or pleasure boats of all kinds on Sunday.

Ohio

OHIO REV. CODE ANN. (Page 1958), §§ 3773.23, -.24, -.26, -.99.

§ 3773.23. *Sunday prohibitions.*

No person shall, on Sunday, participate in or exhibit to the public with or without charge for admittance, in a building, room, ground, garden, or other place, a theatrical dramatic performance or an equestrian or circus performance of jugglers, acrobats, rope dancing, or sparring exhibition, variety show, negro minstrelsy, living statuary, ballooning, baseball playing in the forenoon, or exhibition of motion pictures in the forenoon. No person shall participate in keeping a low or disorderly house or resort, or sell, dispose of, or give away ale, beer, porter, or spirituous liquor in a building appendant or adjacent thereto, where such show, performance, or exhibition is given, or house or place is kept. Complaint must be filed under this section within twenty days after a violation thereof.

§ 3773.24 (Supp. 1959). *Transaction of business on Sunday; exceptions.*

No person, firm, or corporation shall engage in common labor or suffer or permit a building or place to be open for transaction of business, or require a person in his employ or under his control to engage in common labor or to open a building or place for the transaction of business on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.

This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.

This section shall not apply to:

(A) Traveling or the providing of services and commodities incidental thereto;

(B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;

(C) Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto;

(D) The operation of publicly owned places of entertainment, recreation, or education, by a public officer, concessionaire, exhibitor, or employees of all or any of the, or any other person, or the providing of services and commodities incidental thereto.

§ 3773.26. *Prohibition against having hunting implements on Sunday; exception.*

No person shall, in the open air on Sunday, have implements for hunting or shooting with intention to use them for that purpose. The use of hunting implements in trap shooting on Sunday afternoons when conducted under the auspices of a recognized hunt, trap shooting, rifle, or game club of this state, is permitted.

§3773.99 (Supp. 1959). *Penalties.*

* * *

(P) Whoever violates section 3773.23 of the Revised Code shall be fined not more than one hundred dollars or imprisoned not more than six months, or both.

(Q) Whoever violates section 3773.24 of the Revised Code shall be fined twenty-five dollars for a first offense; for each subsequent offense such person shall be fined not less than fifty nor more than one hundred dollars and imprisoned not less than five nor more than thirty days.

(R) Whoever violates section 3773.26 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars.

Oklahoma

OKLA. STAT. ANN. tit. 21, §§ 907-11 (1958):

§ 907. *Sunday to be observed*

The first day of the week being by very general consent set apart for rest and religious uses, the law forbids to be done on that day certain acts deemed useless and serious interruptions of the repose and religious liberty of the community. Any violation of this prohibition is Sabbath-breaking.

§ 908. *Sabbath-breaking defined*

The following are the acts forbidden to be done on the first day of the week, the doing of any of which is Sabbath-breaking:

First. Servile labor, except works of necessity or charity.

Second. Trades, manufactures and mechanical employment.

Third. All shooting, horse racing or gaming.

Fourth. All manner of public selling, or offering or exposing for sale publicly, of any commodities, except that meats, bread, fish and all other foods may be sold at anytime, and except that food and drink may be sold to be eaten and drunk upon the premises where sold, and drugs, medicines, milk, ice and surgical appliances and burial appliances and all other necessities may be sold at anytime of the day.

§ 909. *Persons observing other day as holy*

It is a sufficient defense in proceedings for servile labor on the first day of the week, to show that the accused uniformly keeps another day of the week as holy time, and does not labor upon that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

* * * *

§ 911. *Punishment for Sabbath breaking*

Every person guilty of Sabbath breaking is punishable by a fine of not more than twenty-five dollars for each offense.

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§ 918. (Supp. 1960) *Sale, barter or exchange of motor vehicles on Sunday prohibited—Activities exempt.*

No person, firm or corporation, whether owner, proprietor, agent or employee, shall keep open, operate or assist in keeping open or operating any place or premises or residences whether open or closed, for the purpose of selling, bartering, or exchanging, or offering for sale, barter or exchange, any motor vehicle or motor vehicles, whether new, used or second hand, on the first day of the week, commonly called Sunday; and provided, however that this Act shall not apply to the opening of an establishment or place of business on the first day of the week for other purposes, such as the sale of petroleum products, tires, automobile accessories, or for the purpose of operating and conducting a motor vehicle repair shop, or for the purpose of supplying such services as towing or wrecking.

Oregon

No comprehensive Sunday labor or closing law.

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Pennsylvania

PA. STAT. ANN. tit. 18, 4699.4, -.9, -.10 (1945), as amended (Supp. 1959).

§ 4699.4 (Supp. 1959). *Worldly employment or business on Sunday*

Whoever does or performs any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity, charity and wholesome recreation excepted), shall, upon conviction thereof in a summary

proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.

As used in this section "wholesome recreation" shall mean golf, tennis, boating, swimming, bowling, basketball, picnicking, shooting at inanimate targets and similar healthful or recreational exercises and activities.

Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment for the use of sojourners, travellers or strangers, or to prohibit the sale of newspapers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day. As amended 1959, Aug. 28, P.L. 777, § 1; 1959, Dec. 16, P.L. , No. 684, § 2.

§ 4699.4 (Supp. 1959). *Worldly employment or business on Sunday*[1]

Whoever does or performs any worldly employment or business whatsoever, on the Lord's day, commonly called Sunday (works of necessity and charity only excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.

Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment for

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[1] This section was amended 3 times at the 1959 regular session. Two of the amendments did not refer to the other. Hence both amendments are set out.

the use of sojourners, travellers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or work in connection with the rendering of service by a public utility as defined by the act of May 28, 1937 (P.L. 1053), known as the "Public Utility Law," or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day. As amended 1959, Nov. 19, P.L. 1530, No. 540, § 1.

§ 4699.9. *Buying, selling, exchanging, trading, or otherwise dealing in motor vehicles and trailers on Sunday*

The term "motor vehicle", as used in this section, shall mean every self-propelled device, in, upon or by which any person or property is or may be transported or drawn on a public highway.

The term "trailer", as used in this section, shall mean every vehicle, without motor power, designed to carry property or passengers or designed and used exclusively for living quarters wholly on its own structure, and to be drawn by a motor vehicle.

Whoever engages in the business of buying, selling, exchanging, trading, or otherwise dealing in new or used, motor vehicles or trailers, on Sunday, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense, committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

Information charging violations of this section may be brought within seventy-two (72) hours after the commission of the alleged offense and not thereafter.

§ 4699.10. *Selling certain personal property on Sunday*

Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

Each separate sale or offer to sell shall constitute a separate offense.

Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter.

Rhode Island

R. I. GEN. LAWS (1956) Sec. 11-40-1 to -4:

Sec. 11-40-1. *Work or recreation on Sunday prohibited.*— Except as provided in § 5-22-6 to 5-22-11 [shows and amusements] inclusive, every person who shall do or exercise any labor or business or work of his ordinary calling, or use any game, sport, play or recreation on the first day of the week, or suffer the same to be done or used by his children, servants or apprentices, works of necessity and charity only excepted, shall be fined not exceeding five dollars ($5.00) for the first offense and ten dollars ($10.00) for the second and every subsequent offense; provided, further, however, that the above prohibitions shall not apply to any person or persons operating or functioning under a valid permit or license.

Sec. 11-40-2. *Employment of servants of others on Sunday.*—Every person who shall employ, improve, set to work or encourage the servant of any other person to commit any act named in § 11-40-1 shall suffer the like punishment.

Sec. 11-40-3. *Time of filing complaint.*—All complaints for violations of the provisions of §§ 11-40-1 and 11-40-2 shall be made within ten (10) days after the committing thereof and not afterwards.

Sec. 11-40-4. *Faiths observing other days as Sabbath.*—Every professor of the Sabbatarian faith or of the Jewish religion, and such others as shall be owned or acknowledged by any church or society of said respective professions as members of or as belonging to such church or society, shall be permitted to labor in their respective professions or vocations on the first day of the week, but the exception in this section contained shall not confer the liberty of opening shops or stores on the said day for the purpose of trade and merchandise, or lading, unlading or for fitting out of vessels, or of working at the smith's business or any other mechanical trade in any compact place, except the compact villages in Westerly and Hopkinton, or of drawing seines or fishing or fowling in any manner in public places and out of their own possessions; and in case any dispute shall arise respecting the person entitled to the benefit of this section, a certificate from a regular pastor or priest of any of the aforesaid churches or societies or from any three (3) of the standing members of such church or society, declaring the person claiming the exemption aforesaid to be a member of or owned by or belonging to such church or society, shall be received as conclusive evidence of the fact.

South Carolina

S. C. Code §§ 64-1 to -6 (1952), as amended:

§ 64-1. *Public sports prohibited on Sunday.*

No public sports or pastimes, such as bear-baiting, bull-baiting, football playing, horse-racing, interludes or com-

mon plays, or other games, exercises, sports or pastimes, such as hunting, shooting, chasing game or fishing, shall be used on Sunday by any person whatsoever. Every person offending in any of the premises shall, upon conviction, be guilty of a misdemeanor and be subject to a fine not to exceed fifty dollars or imprisonment not to exceed thirty days.

§ 64-2. *Penalty for working on Sunday.*

No tradesman, artificer, workman, laborer or other person whatsoever, shall do or exercise any worldly labor, business, or work of his ordinary calling upon Sunday or any part thereof, work of necessity or charity only excepted, and every person of the age of fifteen years or upwards offending in the premises shall, for every such offense, forfeit the sum of one dollar.

§ 64-3. *Requiring machine shop labor on Sunday prohibited.*

In addition to the penalties prescribed against tradesmen, artificers, workmen and laborers who shall do or exercise any worldly labor, business or work of their ordinary calling upon Sunday, or any part thereof, any person who shall order, require or direct any work to be done in any machine shop on Sunday, except in cases of emergency, shall be guilty of a misdemeanor and, upon conviction, shall be fined in a sum not less than one hundred dollars and not more than five hundred dollars for each offense.

§ 64-4 (Supp. 1959). *Employment in textile plants on Sunday.*

It shall be unlawful for any person owning, controlling or operating any textile manufacturing, finishing, dyeing, printing or processing plant to request, require or permit any regular employee to do, exercise or perform any of the usual or ordinary worldly labor or work in, of, about or connected with such employee's regular occupation or calling or any party thereof in or about such textile manufacturing, finishing, dyeing, printing or processing plant on

Sunday, work of absolute necessity or emergency and voluntary work in certain departments which is essential to offset or eliminate a processing bottleneck or to restore a balance in processing operations and maintain a normal production schedule excepted, and then only upon condition that such employee be paid on the basis of one and one-half the amount of the usual average day wage or salary earned by such employee during other days of the week. But this section shall not be construed to apply to watchmen, firemen and other maintenance and custodial employees. The term "*regular employee*" as used in this section shall be construed to mean any person who usually or ordinarily works as much as eight hours per week or more in any such textile manufacturing, finishing, dyeing, printing or processing plant, whether employed and paid by the job, by the piece, by the hour or on a salary basis. Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars.

§ 64-4.1 (Supp. 1959). *Same; during times of national emergency in plants producing goods for defense.*

During times of national emergency the Commissioner of Labor shall issue permits to industries regulated by § 64-4 permitting such industries to operate on Sunday when sufficient proof is furnished to the Commissioner that the industries are engaged in producing or processing goods for national defense purposes and under government contract. But no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work and if any employee should refuse to work on Sunday on account of conscientious or physical objections he shall not jeopardize his seniority rights by such refusal or be discriminated against in any other manner. Nothing herein contained shall be taken to authorize the production or processing on Sunday of goods other than those being produced or processed for national defense purposes under government contract.

§ 64-5 (Supp. 1959). *Employment of children or women in mercantile or manufacturing establishments on Sunday.*

It shall be unlawful for any person to employ, require or permit the employment of women or children to work or labor in any mercantile establishment or manufacturing establishment on Sunday except that women shall be permitted to work on Sunday during times of national emergency when they are employed by industries engaged in producing or processing goods for national defense and under government contracts in the same manner and under the same conditions as otherwise provided by law. But no woman shall be permitted to work in the manner herein provided unless and until the industries engaged in producing goods for national defense purposes and under government contract have first submitted to the Department of Labor proof sufficient to establish their national defense status, whereupon the Commissioner of Labor is directed to issue a permit authorizing the employment of women on Sunday, subject, however, to other conditions and circumstances provided by law. But no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work and if any employee should refuse to work on Sunday on account of conscientious or physical objections he shall not jeopardize his seniority rights by such refusal or be discriminated against in any other manner. This section shall not apply to those manufacturing establishments described in § 64-6.

§ 64-5.1 (Supp. 1959). *Exemption of textile plants in Bennettsville; hours of work, etc.*

The provisions of §§ 64-2 to 64-5 shall not apply to textile manufacturing establishments or employees thereof in any city having an exact population of five thousand one hundred and forty, according to the latest official United States census. But no textile manufacturing establishment or its employees shall commence operation or begin a work day or work shift before the hour of ten o'clock p.m. on any Sun-

day. Under this section a work week in excess of forty hours and a work day in excess of eight hours shall not be permissible except when the provisions of the Fair Labor Standards Act are complied with.

§ 64.6. *Exceptions for chemical plants requiring continuous operation.*

The provisions of §§ 64-2 to 64-5 shall not apply to manufacturing establishments or employees thereof when such establishments in the nature of their business involve chemical manufacturing processes requiring, of necessity, for a normal production schedule continuous and uninterrupted operation. In such industries a work week in excess of forty hours and a work day in excess of eight hours shall not be permissible except when the provisions of the Fair Labor Standards Act are complied with. The exemption herein provided shall not apply to or affect cotton, woolen or worsted manufacturing, finishing, dyeing, printing or processing plants and such plants and industries shall be controlled by § 64-4.

South Dakota

S. D. CODE §§ 13.1709 to .1711 (1939):

13.1709. *Sabbath breaking: defined; applied; penalty.* The first day of the week being by very general consent set apart for rest and religious uses, the law forbids to be done on that day certain acts deemed useless, and serious interruptions of the repose and religious liberty of the community. The term "day" as used herein includes the time from midnight to midnight. The following acts are forbidden to be done on the first day of the week, the doing of any of which is Sabbath breaking:

(1) Servile labor, excepting works of necessity or charity;

(2) Trades, manufactures, and mechanical employments;

(3) All manner of public selling or offering or exposing for sale publicly of any commodities, except that meats,

milk, and fish may be sold at any time before nine o'clock in the morning, and except that food may be sold to be eaten on the premises where sold, and drugs and medicines and surgical appliances may be sold at any time of the day;

(4) All shooting, sporting, horse racing, gaming, or other public sport;

(5) All service of legal process of any description, except in cases of breach of the peace or apprehended breach of the peace or when sued out for the apprehension of a person charged with crime or except where such service shall be specially authorized by law.

Every person guilty of Sabbath breaking is punishable by a fine of not more than ten dollars for each offense.

13.1710. *Servile labor by persons observing other days as Sabbath, permitted; regulation.* It is a sufficient defense in proceedings for servile labor on the first day of the week to show that the accused uniformly keeps another day of the week as holy time and does not labor upon that day and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

13.1711. *Malicious service process or forcing trial on Saturday against person keeping such day as Sunday; penalty.* Whoever maliciously procures any process in a civil action to be served on Saturday upon any person who keeps Saturday as holy time and does not labor on that day or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial is guilty of a misdemeanor.

Tennessee

TENN. CODE ANN. §§ 39-4001 to -4003 (1955):

39-4001. *Working on or permitting work on Sunday—Penalty.*—If any person shall be guilty of exercising any of the common vocations of life, or of causing or permitting

the same to be done by his children or servants, acts of real necessity or charity excepted, on Sunday, he shall, on due conviction thereof before any justice of the peace of the county, forfeit and pay ten dollars ($10.00), one-half (½) to the person who will sue for the same, the other half (½) for the use of the county.

39-4002. *Hunting on Sunday.*—Any person who shall hunt on Sunday, shall be subject to the same proceedings, and liable to the same penalties, as those who work on the Sabbath.

39-4003. *Barbering on Sunday—Misdemeanor.*—It shall be a misdemeanor for any person to carry on the business of barbering on Sunday; and any person found guilty of violating this section shall be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00), or imprisoned in the county jail not less than fifteen (15) days nor more than thirty (30) days, or both, in the discretion of the court.

Texas

TEX. PEN. CODE ANN., p. 2, Art. 283 to 287 (1952):

Article 283. *Working on Sunday*

Any person who shall labor, or compel, force, or oblige his employes, workmen, or apprentices to labor on Sunday, or any person who shall hunt game of any kind whatsoever on Sunday within one-half mile of any church, school house, or private residence, shall be fined not less than ten nor more than fifty dollars.

Art. 284. *Not applicable*

The preceding article shall not apply to household duties, works of necessity or charity; nor to necessary work on farms or plantations in order to prevent the loss of any crop; nor to the running of steamboats and other water crafts, rail cars, wagon trains, common carriers, nor to the

delivery of goods by them or the receiving or storing of said goods by the parties or their agents to whom said goods are delivered; nor to stages carrying the United States mail or passengers; nor to foundries, sugar mills, or herders who have a herd of stock actually gathered and under herd; nor to persons traveling; nor to ferrymen or keepers of toll bridges, keepers of hotels, boarding houses and restaurants and their servants; nor to keepers of livery stables and their servants; nor to any person who conscientiously believes that the seventh or any other day of the week ought to be observed as the Sabbath, and who actually refrains from business and labor on that day for religious reasons.

Art. 285. *Horse racing or gaming on Sunday*

Any person who shall run or be engaged in running any horse race, or who shall permit or allow the use of any nine or ten pin alley, or who shall be engaged in match shooting or any species of gaming for money or other consideration, within the limits of any city or town on Sunday, shall be fined not less than twenty nor more than fifty dollars.

Art. 286. *Selling goods on Sunday*

Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employee of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term place of public amusement, shall be construed to mean circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives and places of like character, with or without fees for admission.

Art. 287. *Permitting sale of certain articles on Sunday; regulations as to motion picture shows*

The preceding Article shall not apply to markets or dealers in provisions as to sales of provisions made by them before nine o'clock A.M., nor to the sales of burial or shrouding material, newspapers, ice, ice cream, milk, nor to any sending of telegraph or telephone messages at any hour of the day or night, nor to keepers of drug stores, hotels, boarding houses, restaurants, livery stables, bath houses, or ice dealers, nor to telegraph or telephone offices, nor to sales of gasoline, or other motor fuel, nor to vehicle lubricants, nor to motion picture shows, or theatres operated in any incorporated city or town, after one o'clock P.M.

Sec. 2. The Commissioners or City Council of the towns or cities in which said motion picture shows or theatres are located shall have the right and power by proper ordinance to prohibit or regulate the keeping open or showing of such motion picture shows or theatres on Sunday.

Utah

UTAH CODE ANN. §§ 76-55-1 to -4 (1953):[1]

76-55-1. *Transacting business—Penalty.*—Every person who keeps open on Sunday any store, worksh p, banking house, or other place of business for the purpose of transacting business therein, is punishable by a fine not less than $5 nor more than $100.

76-55-2. *Exemptions.*—The provisions of the preceding section do not apply to persons who keep open hotels, boarding houses, baths, restaurants, bakeries, taverns, livery stables, garages, automotive service stations, golf courses, bowling alleys, ball parks, theatres, bathing resorts, ice stations, news stands, skating rinks, confectionery stores for the sale of confections only, tobacco stores for the sale

[1] Held unconstitutional because unreasonably discriminatory, *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939.

of tobacco, pharmacies, or the prescription counters of retail drug stores on Sunday, for the legitimate business of each, or such industries as are usually kept in continuous operation.

76-55-4. *"Sunday" defined.*—For the purpose of this chapter, Sunday shall commence at midnight Saturday and terminate the following midnight.

Vermont

VT. STAT. tit. 13, §§ 3301-08 (1958):

§ 3301. *Sunday business and entertainment*

A person shall not, between twelve o'clock Saturday night and twelve o'clock the following Sunday night, exercise any secular business or employment, except works of necessity and charity, nor engage in any dance, nor shall a person operate, promote or engage in any play, game, sport or entertainment, except winter sports, tennis or golf, during such hours which disturbs the public peace or for which any compensation is received, directly or indirectly.

§ 3302. *Town vote to permit certain entertainment*

However, the legal voters of a town, at an annual meeting duly warned for that purpose may, by majority vote of the legal voters present and voting, permit the conducting of basketball, football, baseball, moving pictures, lectures or concerts in such municipality on Sunday until June 1 following the annual meeting at which the voters of such town vote otherwise. If such vote permits such entertainment, a person, company or corporation may receive compensation for and charge admission to the same. However, basketball, football, baseball, moving pictures, roller skating, lectures and concerts shall not commence until two o'clock in the afternoon.

§ 3304. *Subsequent warnings; form of ballots*
§ 3306. *Violations—Penalties*

* * * *

A person who violates a provision of sections 3301-3305 of this title shall be fined not more than $200.00 for each offense.

§ 3307. *Jurisdiction*

Justices of the peace shall have concurrent jurisdiction with county and municipal courts of offenses arising under sections 3301-3306 of this title.

§ 3308. *Running of trains on Sunday*

The public service commission may authorize the running upon any railroad of such through trains on Sunday as, in the opinion of such board, the public necessity and convenience may require, having regard to the due observance of the day.

Virginia

VA. CODE ANN. 18.1-358 to -363 (1960 Supp.):

§ 18.1-358. *Working or transacting business on Sunday.*— On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person to engage in work, labor or business or to employ others to engage in work, labor or business except in household or other work of necessity or charity. The exemption for works of necessity or charity contained in the preceding sentence shall not be deemed to include selling at retail or wholesale or by auction, or offering or attempting to sell, on Sunday, any of the following: jewelry; precious and semi-precious stones; silverware; watches; clocks; luggage; musical instruments; recordings; toys (excluding items customarily sold as novelties and souvenirs); clothing and wearing apparel; clothing accessories; footwear; textile yard goods; housewares; china; kitchenware; home, business, office or outdoor furniture, furnishings and appliances; sporting goods (excluding sales or rental of bathing, boating, and fishing paraphernalia and equipment, and sales or rental on the premises where sports, athletic events or recreational

facilities are located or conducted of equipment essential to the normal use or operation of such premises for the purposes specified); pets, pet equipment or supplies; cameras and photographic supplies (excluding film and flash bulbs); hardware; tools; paints; building and lumber supplies and materials; motor vehicles; trailers (excluding mobile homes); farm implements; lawn and garden equipment and supplies; farm produce (excluding sales of farm produce grown by the seller and sold at roadside stands or at the place where grown) or fresh, frozen or salt meats, poultry or seafood customarily inedible without further cooking or preparation (excluding smoked or cured hams). No inference shall arise from the foregoing enumeration of classes of personal property that sales or offers or attempts to sell other classes of personal property not mentioned are included within the above exemption for works of necessity or charity. This section shall not apply to furnaces, kilns, plants, wholesale food warehouses, ship chandleries, and other business of like kind that may be necessary to be conducted on Sunday, nor to the publication, distribution and sale of newspapers or magazines, nor to the sale of motor fuels or oils, repair parts or accessories for immediate necessary use in connection with motor vehicles, boats or aircraft, nor to the operation of motion picture theatres, nor to sports, athletic events, scenic, historic and recreational and amusement facilities.

§ 18.1-358.1. *Punishment for violation.*—Any person violating the provisions of § 18.1-358 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than one hundred dollars for the first offense and not more than two hundred dollars for the second or any subsequent offense occuring within one year after conviction of the first offense, or in default thereof shall be confined in jail for not exceeding thirty days. In addition, the court in which any judgment of conviction is rendered may require of the person so convicted a recognizance in a penalty of not less than five hundred or more than five thousand

dollars, with or without security, conditioned that such person shall be of good behavior, and especially shall refrain from a repetition of such offense for a period not exceeding twelve months. Each separate sale, offer or attempt to sell on Sunday the classes of personal property enumerated in § 18.1-358, and each Sunday a person is engaged in other work, labor or business in violation of § 18.1-358, or employs others to be so engaged, shall constitute a separate offense.

§ 18.1-358.2. *Continued violations deemed a nuisance.*—In addition to the penalties upon conviction of violations hereinabove provided, the premises in or upon which the violations occurred shall be deemed a nuisance after any four violations of § 18.1-358 occurring within any period of twelve months have resulted in convictions.

§ 18.1-359. *Observance of Saturday.*—The penalties imposed by §§ 18.1-358.1 and 18.1-358.2 shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day, provided he does not compel an apprentice or servant, not of his belief, to do secular work or business on a Sunday.

§ 18.1-360. *What transportation, etc., by railroads on Sunday prohibited.*—No railroad company, receiver, or trustee, controlling or operating a railroad, shall, by any agent or employee, load, unload, run or transport upon such road on a Sunday, any car, train of cars or locomotive, nor permit the same to be done by any such agent or employee, except:

[Specified operations]

§ 18.1-361. *What time the word "Sunday" in preceding sections embraces.*—The word "Sunday" as used in the preceding section shall be construed to embrace only that portion of the day between sunrise and sunset; and trains in transit having started prior to twelve o'clock on Saturday night, may, in order to reach the terminus or shops of the

railroad, run until nine o'clock the following Sunday morning, but not later.

§ 18.1-362. *Violations of section 18.1-360.*—Any railroad company, receiver, or trustee violating the provisions of § 18.1-360 shall be deemed to have committed a separate offense in each county or corporation in which such car, train of cars, or locomotive shall run, or in which such car or train of cars shall be loaded or unloaded; and shall be fined not less than fifty nor more than one hundred dollars for each offense.

§ 18.1-363. *To prohibit the loading and unloading of steamships on Sunday.*—No steamboat company shall by any agent or employee load or unload on a Sunday any steamship or steamboat arriving at any port or landing on the bays, rivers, or other waters of this State or permit the same to be done by any such agent or employee except when such steamship or steamboat is for the transportation

[of passengers and specified articles]

Washington

WASH. REV. CODE c. 9.76 (1956):

9.76.010. *Defined.* Every person who, on the first day of the week, shall promote any noisy or boisterous sport or amusement, disturbing the peace of the day; or who shall conduct or carry on, or perform or employ any labor about any trade or manufacture, except livery stables, garages and works of necessity or charity conducted in an orderly manner so as not to interfere with the repose and religious liberty of the community; or who shall open any drinking saloon, or sell, offer or expose for sale, any personal property, shall be guilty of a misdemeanor: *Provided,* That meals, without intoxicating liquors, may be served on the premises or elsewhere by caterers, and prepared tobacco, milk, fruit, confectionery, newspapers, magazines, medical and surgical appliances may be sold in a quiet and orderly manner. In

works of necessity or charity is included whatever is needful during the day for the good order or health or comfort of a community; but keeping open a barber shop, shaving or cutting hair shall not be deemed a work of necessity or charity, and nothing in this section shall be construed to permit the sale of uncooked meats, groceries, clothing, boots or shoes.

9.76.020. *Observance of other day.* It shall be a sufficient defense to a prosecution for performing work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time and that the act complained of was done in such manner as [will] not disturb others in the observance of the sabbath.

9.76.030. *Service of process on the sabbath prohibited.* Every person who shall serve any legal process on the sabbath day, except in case of a breach, or apprehended breach, of the peace, or when sued out for the apprehension of a person charged with a crime, or where such service is expressly authorized by statute, shall be guilty of a misdemeanor.

West Virginia

W. VA. CODE ANN. §§ 6072-73 (1955), as amended (Supp. 1959):

§ 6072. *Labor on Sabbath Day; Shooting or Carrying Firearms on Same; Penalty.*—If any person, on a Sabbath day, be found laboring at any trade or calling, or employ his minor children, apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than fifteen dollars for each offense; and every day any such minor child, servant or apprentice is so employed shall constitute a separate and distinct offense. Any person found shooting or carrying firearms on the Sabbath day shall be guilty of a misdemean-

or, and, upon conviction, shall be fined not less than ten dollars.

§ 6073 (1959 Supp.). *Limitation of Preceding Section; Contract Made on Sabbath Day Valid.*—No forfeiture shall be incurred or conviction had under the preceding section for the transportation on the Sabbath day of the mail, or of passengers and their baggage carried by any mode of public conveyance, or for running any railroad train, traction car or system, automobile or other motor car carrying passengers for pleasure or hire, steamboat or other boat used in carrying passengers or freight, garages, gasoline service stations, manufacturing establishments, or any of their employees where the processes of said manufacture require continuous operation and where said employees are on rotating shift schedules, on the Sabbath day, or for the operation of, or labor in, grocery stores or other similar establishments engaged primarily in the sale of food products for human consumption: Provided, however, that no such establishment located within three hundred feet of a church shall remain open for business on the Sabbath day during the customary hours for morning and evening worship in such church, or for carrying firearms or shooting on that day, by any person having the right so to do under the laws of the United States or of this state; and no forfeiture shall be incurred or conviction had under the preceding section by or of any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from all secular business and labor on that day, provided he does not compel any apprentice or servant not of his belief to do secular work or business on Sunday, and does not on that day disturb any other person in his observance of the same. No contract shall be deemed void because it is made on the Sabbath day.

Wisconsin

No comprehensive Sunday labor or closing law.

Wyoming

WYO. COMP. STAT. ANN. § 15-160 (12) (1957) (local option):

§ 15-160. *Specific corporate powers.*—The town council of any such town, in its corporate capacity, shall have the following powers:

Twelfth.—Public peace and safety. To prevent and restrain riots, routs, noises, disturbances or disorderly assemblies in any street, house or place in the town; to regulate, punish and prevent a discharge of firearms, rockets, powder, fireworks or any other dangerously combustible material, in the streets, lots, grounds, alleys, or about or in the vicinity of any buildings; to regulate and punish the carrying of concealed weapons; to arrest, regulate, punish, fine or set to work all vagrants and persons found in said town without visible means of support or some legitimate business; to close all places of business on the Sabbath day, commonly called Sunday; and to prohibit and suppress the sale of spirituous and intoxicating liquors on any day of municipal, county or state election.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 11

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, *et al.*,

Appellants,

against

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., *et al.*,

Appellees.

BRIEF OF AMERICAN JEWISH COMMITTEE and ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICI CURIAE*

FREDERICK F. GREENMAN
New York, New York
Attorney for American Jewish Committee

BERNARD NATH
Chicago, Illinois
Attorney for Anti-Defamation League of B'nai B'rith

Amici Curiae

ABRAHAM BLUMBERG
ARNOLD FORSTER
PAUL HARTMAN
THEODORE LESKES
EDWIN J. LUKAS
SOL RABKIN
New York, New York
Of Counsel

307 BAR PRESS, INC., 84 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 5-3432

TABLE OF CONTENTS

	PAGE
Interest of the Amici	1
Statement of the Case	3
The Question Presented	6
Summary of Argument	7
Argument	
I—Laws barring labor, business or work on Sundays violate the First Amendment's prohibition against an establishment of religion	8
A. The "Establishment of Religion" Clause of the First Amendment	8
B. The Religious Origin of Sunday Laws	10
C. The Current Religious Purpose of Sunday Laws	12
D. The Nature and Significance of the Exceptions to the Sunday Laws	16
E. Religious Basis for Recent Rulings	18
F. Prior Decisions of This Court Discussing Sunday Laws	25

PAGE

II—Laws barring labor, business or work on Sundays violate the First Amendment's guarantee of freedom of religion 30

A. Aid to Majority Religions an Impairment of Religious Freedom 30

B. Imposed Conformity with Sectarian Conduct 32

C. Sunday Laws and Economic Coercion 33

III—Laws barring labor, business or work on Sundays violate the Fourteenth Amendment's guarantee of equal protection of the laws unless they exempt those who observe a different day as their holy day 35

Conclusion 37

Appendix (The Statute Involved) 38

Table of Authorities

Cases:

Barnie's Case (Md.) unreported 24
Board of Education v. Minor, 23 Ohio St. 211 (1872) 22
Brimhall v. Van Campen, 8 Minn. 1 15
Burstyn v. Wilson, 343 U. S. 495 (1952) 20, 22

Cantwell v. Connecticut, 310 U. S. 296 (1940) 8, 16, 22, 31
Church of the Holy Trinity v. U. S., 143 U. S. 457 (1892) 32
City of Harlan v. Scott, 290 Ky. 585 (1942) 16
Commonwealth v. Chernock, 336 Mass. 384 (1957) 6, 16

PAGE

Commonwealth v. Has, 122 Mass. 40 (1877) 37
Commonwealth v. Hoover, 25 Pa. Sup. Ct. 133 (1904) 11
Commonwealth v. McCarthy, 244 Mass. 484 (1923) 12
Crown Kosher Super Market of Massachusetts, Inc. et al. v. Raymond P. Gallagher, 176 Fed. Supp. 466 (1959) 6

Davis v. Fish, 1 Greene's Rep. 406 (1848) 15
Davis v. Somerville, 128 Mass. 594 (1880) 12, 14

Everson v. Board of Education, 330 U. S. 1 (1947) 8, 9, 10, 16, 22, 30, 31

Fowler v. Rhode Island, 345 U. S. 67 (1953) 35
Friedman v. People of the State of N. Y., 341 U. S. 907 (1951) 30

Gandalfo v. Hartman, 49 F. 181 (1892) 26

Hennington v. Georgia, 163 U. S. 299 (1859) 26, 28, 29

Johns v. State, 78 Ind. 332 (1881) 34
Judefind v. State, 78 Md. 510 (1894) 23, 24

Karwisch v. Mayor and Council of Atlanta, 44 Ga. 204 (1871) 15
Kilgour v. Miles, 6 Gill & J. 268 (1834) 23

Levering v. Board of Park Commissioners, 134 Md. 48 (1919) 23
Lindenmuller v. People, 33 Barb. 548 (1861) 19, 20, 21, 22, 23

McCollum v. Board of Education, 333 U. S. 203 (1948) 8, 9, 10, 16, 22, 31

PAGE

McGee v. North Carolina, 237 N. C. 633, app. dism., 346 U. S. 802 (1953) 18
McGowan v. Maryland, 220 Md. 117 (1959) 16, 23, 24
Meinhard v. Salmon, 249 N. Y. 458 (1928) 16
Murdock v. Pennsylvania, 319 U. S. 105 (1943) 8, 22, 31

Neuendorff v. Duryea, 69 N. Y. 557 (1877) 19
Niemotko v. Maryland, 340 U. S. 268 (1951) 35

O'Donnell v. Sweeney, 5 Ala. 467 (1843) 15

People v. Friedman, 302 N. Y. 75 (1950) 10, 16, 18, 19, 22, 23, 30
People v. Havnor, 149 N. Y. 195 (1896) 19
People v. Moses, 140 N. Y. 214 (1893) 19
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Philadelphia, Wilmington and Baltimore R. R. v. Lehman, 56 Md. 209 (1881) 15, 23, 24

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PAGE

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PAGE

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IN THE

Supreme Court of the United States

October Term, 1960

No. 11

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, *et al.*,

Appellants,

against

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., *et al.*,

Appellees.

BRIEF OF AMERICAN JEWISH COMMITTEE and ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICI CURIAE*

Interest of the Amici

The American Jewish Committee, formed in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful

assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

The American Jewish Committee and the Anti-Defamation League of B'nai B'rith are gravely concerned with the issues presented by this case. Freedom of religious belief, observance and worship, both organizations are firmly convinced, can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs. The organizations have always regarded the constitutional principle of separation of Church and State as one of the foundations of our American democracy and a bulwark of religious freedom.

Consistent with their purposes, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith are opposed to all manifestations of religious discrimination, including those involved in this case.

For these reasons, the two organizations join in filing this brief *amici curiae* with the consent of the parties.

Statement of the Case

The Court below summarized the facts in this case, most of which were stipulated, as follows:

This lawsuit was instituted by Crown Kosher Super Market of Massachusetts, Inc., a corporation operating a kosher supermarket in Springfield, Massachusetts, and three named customers thereof, suing on behalf of themselves and others similarly situated, and by a rabbi suing on behalf of himself and other rabbis similarly situated. The plaintiffs sought a declaration that certain provisions of the Lord's day statute of Massachusetts are unconstitutional, as applied to the plaintiffs.[1] They also sought preliminary and final injunctions restraining the enforcement of such provision.

The corporate plaintiff's supermarket offers for sale all categories of food. All of its meats and meat products are kosher, and something like 95 per cent of the rest of its stock is kosher. It is apparently the only store of this kind within a 26-mile radius of Springfield.

The four officers and stockholders and the six directors of the corporate plaintiff are all adherents of the Orthodox Jewish faith and duly observe the Jewish Sabbath from sundown on Friday to sundown on Saturday. A very substantial percentage of the corporate plaintiff's customers are Orthodox Jews, and most of the others are Conservative Jews who observe the Jewish Sabbath.

The due observance of the Jewish Sabbath requires total abstinence from business and work. Riding in auto-

1. The relevant provisions of the Lord's Day Act of Massachusetts (M. G. L. A., Ch. 136) are set forth in the appendix.

mobiles or other conveyances is forbidden. The religious belief of the officers, directors and stockholders of the corporate plaintiff completely precludes the operation of the store on the Jewish Sabbath since that would be doing business vicariously and causing others to work on the Sabbath. The large majority of Crown Market's customers, who share these beliefs, may not shop nor cook on the Sabbath. Preparation for meals during the 24 hours of the Jewish Sabbath, and especially the traditional family feast on Friday night, consumes most of the daylight hours on Friday.

Crown Market is not open for business between sun-down on Friday and sun-down on Saturday, and on 13 Jewish holidays each year. The Crown Market is open for business from 8:00 A.M. to 6:00 P.M. every Sunday and has been open every Sunday (excluding Jewish holidays) since it was established August 18, 1953. More than one-third of its gross sales each week are made on Sunday.

Two of the three named customer plaintiffs are residents of Springfield, and the third is a resident of Turners Falls, 43 miles to the north. All are Orthodox Jews who are regular customers of the corporate plaintiff's store. These three customers represent a class of Orthodox Jewish people of the area served by the corporate plaintiff's store, who seek to enforce their civil rights by obtaining a common relief.

The named plaintiff rabbi is the Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and is the president of the Massachusetts Council of Rabbis. He has been duly authorized by the latter organization to represent it in this case. Besides his religious duties

as leader and teacher of his congregation, the plaintiff rabbi has the duty (which he discharges through an inspector) of inspecting kosher meats and butcher shops daily except on the Jewish Sabbath to insure compliance with Jewish dietary laws. The inspector comes to the Crown Market at 8:00 A.M. on Sunday for the washing of any meat which is on hand from animals slaughtered on the previous Thursday. Among the dietary rules enforced is that fresh meat must be rewashed every 72 hours, that only meats and seafoods of certain kind and quality may be eaten, and that meat and dairy products must not be commingled, even by the use of the same implements for both. The plaintiff rabbi represents a class, which seeks to enforce its common rights by a common relief.

The defendant, who is the Chief of Police of Springfield, Massachusetts, threatens to enforce the Lord's Day Act to the full extent of his authority by instituting criminal prosecutions against the corporate plaintiff, its officers, stockholders, directors and employees, for each violation, that is, for each Sunday on which Crown Market is open for business.

The manager of the Crown Market, president of the corporation and a stockholder, was convicted of violating the Lord's Day Act in the Massachusetts state court. His exceptions in that trial, which questioned the constitutionality of that law under the state constitution but raised no Federal constitutional issue, were overruled by the Supreme Judicial Court. *Commonwealth* v. *Chernock*, 336 Mass. 384 (1957).

Judge William T. McCarthy, who dissented below, disagreed with the majority as to the facts in this case,

citing the agreed upon facts in *Commonwealth* v. *Chernock, supra.* A comparison of the facts as set forth by the Court below with the agreed upon facts in *Chernock,* we respectfully submit, reveals no substantial disagreement, and certainly no factual differences which can possibly affect the constitutional issues.

The statutory Federal District Court for the District of Massachusetts gave judgment for the plaintiffs. It held the Massachusetts Lord's Day Act unconstitutional under the First and Fourteenth Amendments. One judge dissented. The opinions appear at 176 F. Supp. 466 (1959).

The Question Presented

This case presents this Court with the question whether a state law, such as the Massachusetts Lord's Day Act, barring labor, business or work on Sundays, violates those clauses of the First Amendment prohibiting an establishment of religion and guaranteeing its free exercise, and violates the equal protection clause of the Fourteenth Amendment.

Summary of Argument

This Court, while it has discussed Sunday laws in several cases, has never decided the constitutional issues raised herein. The religious origin of Sunday laws is undisputed. That their religious purpose continues is demonstrated by an examination of their language, by the nature of the exceptions and by an analysis of the legal precedents upon which recent decisions upholding their constitutionality are based. Therefore, such laws are an establishment of the religion of those sects which observe Sunday as their holy day, in violation of the First Amendment, as the same has been held applicable to the states by the Fourteenth Amendment.

Sunday laws violate the religious freedom of Jews, Seventh Day Adventists, Seventh Day Baptists and all others who do not observe Sunday as their holy day. These laws require religious non-conformists to manifest a pattern of conduct inconsistent with their own religious commitment and consistent only with the religious beliefs of the majority. By prohibiting business and shopping on Sunday, such statutes impose an economic penalty upon those who observe Saturday as their Sabbath.

Independent of any consideration under the First Amendment, Sunday laws which do not completely exempt from their strictures those who observe another day of the week as their Sabbath, deny them equal protection of the laws.

ARGUMENT

I—Laws barring labor, business or work on Sundays violate the First Amendment's prohibition against an establishment of religion.

A. The "Establishment of Religion" Clause of the First Amendment

The First Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *

This provision against action by Congress has been held equally applicable to action by the states or any of their political subdivisions. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

The "establishment of religion" clause has been defined by this Court in three recent decisions: *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) and *Zorach* v. *Clauson*, 343 U. S. 306 (1952). There was no disagreement between the majority and minority opinions in *Everson* on the following definition:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain

> away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State" 330 U. S. at 15-16; see also 41, 52, 53, 59, 60.

In *McCollum* this definition of the establishment clause was the basis for a determination that a released time program in the public schools of Champaign, Illinois violated the First Amendment. Under that program, children attending public schools were released one hour during each week to receive religious instruction within the school buildings from teachers provided and paid by religious groups. In an eight to one decision, this Court struck down that system quoting with approval the definition of establishment from the *Everson* case 333 U. S. at 210-211.

This Court's interpretation of the meaning of "establishment of religion" was in no way weakened or modified by its subsequent decision in *Zorach* v. *Clauson*, *supra*, upholding the New York released time program. In that case, this Court distinguished the facts from those in the *McCollum* case, since the New York program did not involve use of public school buildings for religious instruction.

The Court expressly re-affirmed the principle enunciated in *Everson* and *McCollum*—"We follow the *McCollum* case." 343 U. S. at 315.

There was agreement among the members of this Court in defining the "establishment of religion" clause in *Everson, McCollum* and *Zorach* that, whatever else it means, it certainly prohibits the state or any of its political subdivisions from singling out one or a few religions for special assistance or from giving some religions preferential treatment over others.

B. The Religious Origin of Sunday Laws

An examination of the origin of Sunday laws establishes that their function is to compel observance of the Christian holy day. Both the majority and minority opinions below acknowledge that the Massachusetts statute originally had religious motivation and purpose. 176 F. Supp. 466 (1959). The statute of 1653 was intended "to compel a seemly observance" of the Sabbath celebrated by the dominant Christian sect. at 472. The preamble to the early forms of the statute made its religious intent obvious. at 480.

The Supreme Court of New Jersey described Sunday legislation as "the product of Church-State unions. The American colonists brought with them the tradition of a state-established religion * * * and perhaps solely for sectarian reasons the authority of colonial government was exerted to support the Christian Sabbath." *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 205 (1960).

The New York Court of Appeals also recognized that Sunday laws "may be said to have had a religious origin." *People* v. *Friedman* 302 N. Y. 75, 79 (1950).

The Superior Court of Pennsylvania, in *Commonwealth* v. *Hoover,* 25 Pa. Super. Ct. 133, (1904), in tracing the origin and development of Sunday laws, said:

> Sunday legislation is more than fifteen centuries old, and the "historic argument" is of value in construing existing law. "All Sunday legislation is the product of Pagan Rome; the Saxon laws were the product of Middle Age legislation of 'The Holy Roman Empire.' The English laws are the expansion of the Saxon, and the American are the transcript of the English." The first Sunday law, the edict of the Emperor Constantine, was the product of that pagan conception developed by the Romans which made religion a part of the state. The day was to be venerated as a religious duty owed to the God of the Sun. During the Middle Ages, the civil authorities exercised the right to legislate in religious matters after the manner of the Jewish Theocracy. The English Reformation introduced, for the first time, the doctrine of the Fourth Commandment to the first day of the week. at 134.

The highest court of Massachusetts described Sunday statutes in the same way:

> Our Puritan ancestors intended that the day [Sunday] should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares of amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial

modification, to the present time. *Davis* v. *Somerville,* 128 Mass. 594, 596 (1880).[2]

Sunday was adopted by Christians as the holy day in lieu of Saturday. This was done centuries after Christ in commemoration of the Resurrection. *Rodman* v. *Robinson,* 134 N. C. 503, 510 (1904); 21 ENCYCLOPEDIA BRITANNICA 565 (1959 ed.) Thus, Sunday laws were enacted to lend the authority of the state to require compliance with the observance of the Sabbath of those religious sects for whom Sunday is a holy day. The authority of the state was in no way put behind the observance of the Sabbath of those religious groups which regard some day other than Sunday as their holy day.

The sectarian origin and character of Sunday laws was recognized by this Court in *Richardson* v. *Goddard,* 64 U. S. (23 How.) 28 (1860). "The observance of Sunday as a Sabbath or day of ceremonial rest was first enjoined by Emperor Constantine as a civil regulation, in conformity with the practice of the Christian church." at 41.

C. The Current Religious Purpose of Sunday Laws

An examination of the Sunday laws currently on the statute books of the various states shows beyond doubt that the original motivation and intent of such legislation still continues. The very title of Chapter 136 of the Laws of Massachusetts, "Observance of the Lord's Day," and the frequent reference to "the Lord's Day" in the

2. See also, *Commonwealth* v. *McCarthy,* 244 Mass. 484, 486 (1923) and notes on Sunday Laws in 35 So. Cal. L. Rev. 131 (1951), 3 St. Louis U. L. J. 300 (1955).

body of the chapter demonstrates the religious nature of the present act. The phrase used to spell out an exception for "works of necessity and charity" (Sec. 5) is derived verbatim from 29 *Car* II, Ch. 7 (1676), the first English Sunday closing law, the religious motivation of which is beyond question. Even the exception set forth in Sec. 6 of the Massachusetts statute for a person who "conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day," is meaningful only as an exception to a prohibition sectarian in nature. Also, the statute contains a specific ban in Sec. 2 on presence at games, sports, play or public diversions "except a concert of sacred music." Other exceptions are made in Sec. 2 for "celebration of a religious custom or ritual" and in Sec. 10 for parades "for the purpose of attending divine service." Here again, the exceptions clearly demonstrate that the purpose of the statute is religious. Note also the use of the term "secular business" in Sections 5 and 12.

Massachusetts is not alone in using religious terms to set forth its Sunday prohibitions. Practically all the states having such legislation on their books use terms such as : "Lord's Day"[3], "Desecration"[4], "Religious Uses"[5] or "Religious Holidays."[6] Also, the exception,

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3. *Ga.* Code Anno., sec. 26-6905; *Maine* Rev. Stats., ch. 134, sec. 38; *Md.* Code Anno., Art. 27, sec. 492; *N. H.* Rev. Stats., Anno., sec. 578:3; Purdon's *Pa.* Stats., Anno., Tit. 18, secs. 632, 4699.4; *S. C.* Code, secs. 64-1, 64-2.

4. *Kan.* Gen. Stats., Anno., sec. 13-430; *Neb.* Rev. Stats., sec. 28-940; Purdon's *Pa.* Stats., Anno., Tit. 18, sec. 4699.4.

5. *N. D.* Rev. Code (1943), sec. 12-2115; *Okla.* Stats., Anno., Tit. 21, sec. 907; *S. D.* Code (1939), Tit. 13, sec. 1709.

6. *Ga.* Code Anno., sec. 14-1810.

total or partial, for persons observing some other day as their Sabbath is found in many other statutes.[7]

A telling example of the unchanged religious nature of a Sunday closing law is provided by the laws of Maryland, where the statute enacted in 1723, using religious terms such as "Lord's Day," "profane", and "works of necessity and charity," has remained virtually unchanged to the present day. Anno. Code of Maryland, 1957, Art. 27, Sec. 492.

The language of many court decisions acknowledges the continuing religious purpose of Sunday laws. *Davis* v. *Somerville, supra.* In a recent decision, the Supreme Court of New Jersey stated that that state's Act of 1951, prohibiting worldly employment or business, except works of necessity and charity, on the Christian Sabbath, "strongly suggests orientation to a sectarian desire to protect the Sabbath, as such, against 'desecration.'" *Two Guys from Harrison, Inc.* v. *Furman, supra,* at 217.

The highest court of Georgia described that state's Sunday law in the following terms: "The law fixes the day recognized as the Sabbath Day all over Christendom, and that Day, by divine injunction, is to be kept holy—'on

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7. *Ark.* Stats., Anno., sec. 41-3806; *Conn.* Gen. Stats., (Rev. 1958), ch. 946, sec. 53-303; Smith-Hurd *Ill.* Stats., Anno., ch. 38, sec. 549; Burns *Ind.* Stats., Anno., ch. 43, sec. 10-4301; *Iowa* Code Anno., ch. 729, sec. 729.1; *Kan.* Gen. Stats., Anno., sec. 69-101; *Ky.* Rev. Stats., Anno., sec. 436.160; *Maine* Rev. Stats., ch. 134, sec. 44; *Mich.* Stats., Anno., sec. 18.122; *Minn.* Stats., Anno., ch. 614, sec. 614.30; Vernon's *Mo.* Stats., Anno., sec. 563.700; *Neb.* Rev. Stats., sec. 28.940; McKinney's *N. Y.* Penal Law, sec. 2144; *N. D.* Rev. Code, sec. 12-2117; Page's *Ohio* Rev. Gen. Code Anno., sec. 3773.24; *Okla.* Stats., Anno., Tit. 21, sec. 909; *R. I.* Gen. Laws, sec. 11-40-4; *S. D.* Code (1939), Tit. 13, sec. 1710; Vernon's *Texas* Penal Code Anno., Art. 284; *Va.* Code, sec. 18.1-359; *Wash.* Rev. Code, sec. 9.76.020; *W. Va.* Code (1955), sec. 6073.

it thou shalt do no work.'" *Karwisch* v. *Mayor and Council of Atlanta*, 44 Ga. 204, 208 (1871).

In *Brimhall* v. *Van Campen*, 8 Minn. 1 (date not given) in voiding a note executed on Sunday, the Supreme Court of Minnesota said: "This Sunday act can have no other object than the enforcement of the fourth of God's commandments." at 5.

The Supreme Court of Iowa characterized Sunday as "established by laws, both human and divine, for public worship and private devotion * * * that time-honored and heaven appointed institution." *Davis* v. *Fish*, 1 Greene's Rep. 406, 412 (1848).

The Supreme Court of Alabama described that state's Sunday law in the following terms: "We do not think the design of the legislature in the passage of the act can be doubted. It was evidently to promote morality and advance the interest of religion, by prohibiting all persons from engaging in their common and ordinary avocations of business, or employment, on Sunday * * *." *O'Donnell* v. *Sweeney*, 5 Ala. 467, 469 (1843).

The Supreme Court of Maryland, in analyzing and commenting upon different Sunday laws in different states, said: "* * * while they may differ in their phraseology and the penalties imposed, they are substantially the same in their general scope and provision:—all looking to keeping the day sacred, and as one of rest from secular employment * * *" *Philadelphia, Wilmington and Baltimore R. R.* v. *Lehman*, 56 Md. 209, 227 (1881).

From all that has been said above, it follows that Sunday laws violate that section of the First Amendment which prohibits both the states and the Federal Government from enacting any laws "which aid one religion, aid all religions or prefer one religion over another," from "particip[ing] in the affairs of any religious organizations or groups," *Everson* v. *Board of Education, supra, McCollum* v. *Board of Education, supra,* or which "coerce anyone to attend church [or] to observe a religious holiday" *Zorach* v. *Clauson, supra,* at 314, or which fail to maintain neutrality in the competition between religious sects, *ibid.*

D. The Nature and Significance of the Exceptions to the Sunday Laws

When this Court held that the First Amendment was a limitation upon the states as well as upon the Congress, *Cantwell* v. *Connecticut, supra,* Sunday laws could no longer be sustained if their true character, as laws in aid of religion, were acknowledged. The courts of many states thenceforth sustained Sunday laws by asserting or rationalizing that they were predicated upon the power of the state to protect the public health and welfare by mandating a day of rest. *People* v. *Friedman, supra,* app. dismissed 341 U. S. 907 (1951); *McGowan* v. *Maryland,* 220 Md. 117 (1959); *Commonwealth* v. *Chernock,* 336 Mass. 384 (1957); *City of Harlan* v. *Scott,* 290 Ky. 585 (1942); 3 St. Louis U. L. J. 300 (1955).

If the true purpose of Sunday legislation were to provide for a day of rest in the interest of public health and welfare, rather than to enforce religious observance of the Christian Sabbath, how do the legislatures countenance the "disintegrating erosion of particular exceptions?"[8]

8. Cardozo, C. J., in *Meinhard* v. *Salmon,* 249 N. Y. 458, 464 (1928).

To carry out a welfare purpose, it would appear that the legislatures would, if rest were the purpose of the statutes, tolerate fewer exceptions rather than grant more, as is actually the case, state by state.

For example, under the law of Massachusetts (Ch. 136), the following activities are or may be exempt from the general ban on Sunday work and labor. exhibition of motion pictures after 1:00 P.M. (Sec. 4); operation after 1:00 P.M. of shooting galleries, bowling alleys and photographic studios (Secs. 4A, 4B); the retail sale of tobacco, bread (before 10:00 A.M. and between 4:00 P.M. and 6:30 P.M.), frozen desserts and/or ice cream mixes, soda water and confectionery; the operation of motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the preparation, printing, publication, sale and delivery of newspapers; the making of butter and cheese; the keeping open of public bath houses; the operation of a shoe shining parlor (before 11:00 A.M.); the digging of clams; the icing and dressing of fish; unpaid work in or about private gardens or private grounds adjacent to a dwelling house; the sale of catalogs of pictures and other works of art in certain types of exhibitions, (Sec. 6); and parades held by certain groups (Secs. 10 and 11).

The corresponding laws of other states are punctured by similar exceptions. As to New York, see McKinney's Penal Law, Secs. 2147, 2151, 2152, 2154. As to Connecticut, see Gen. Stats. (1958 Rev.) Secs. 53-300, 53-302. As to Minnesota, see Stats., Anno., Secs. 340.021, 614.29. As to New Hampshire, see Rev. Stats., Anno., (1955) Secs.

578.3, 578.4, 578.5. As to Pennsylvania, see Purdon's Stats., Anno., Tit. 4, Secs., 60, 82, 121, 122, 152, 156, 182; Tit. 18, Sec. 4699.4; Tit. 47, Sec. 4-406.

The fact that many state Sunday laws prohibit certain activities, such as baseball and football games and other athletic contests before 1:00 P.M. or 2:00 P.M. on Sundays cannot be explained logically if such statutes are intended solely as health and welfare measures under the police power to insure a day of rest. On the other hand, such prohibitions are fully consistent with the purpose of discouraging activities which might compete with church attendance at morning services. In Charlotte, North Carolina where church services are customarily held between 6:30 P.M. and 9:00 P.M. on Sundays, a municipal ordinance prohibits the operation of drive-in theatres during those hours. See *McGee* v. *North Carolina*, 237 N. C. 633 app. dismissed, 346 U. S. 802 (1953).

E. Religious Basis for Recent Rulings

A number of state court decisions, upholding the constitutionality of Sunday laws on the asserted ground that they serve public health and welfare, rely on old decisions which, in upholding their constitutionality, nevertheless reveal an acknowledgment of their basic religious character.

The decision of the New York Court of Appeals in *People* v. *Friedman*, *supra*, provides an excellent illustration for this misuse of old precedents. This is the case which is frequently cited by those who claim that Sunday laws are motivated by secular considerations. It was on this case that Judge McCarthy, the dissenter below, relied in holding that the Massachusetts Sunday law, al-

though religious in origin, through a curious metamorphosis of statutory interpretations, has become a civil regulation.

In the *Friedman* case, the New York Court of Appeals ruled that the "power of the Legislature to regulate the observance of Sunday as a civil and political institution is well settled." at 80. In addition to citing three U. S. Supreme Court decisions (which will be discussed below), the opinion relies on two decisions of the New York Court of Appeals: *People* v. *Moses*, 140 N. Y. 214 (1893) and *People* v. *Havnor*, 149 N. Y. 195 (1896).

In *People* v. *Moses*, the Court stated: "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being of the people, and the peace, quiet and good order of society, has authority to regulate its observance, and prevent its desecration by any appropriate legislation is unquestioned." at 215 The *Moses* opinion then cites the following two decisions of the same Court: *Lindenmuller* v. *People*, 33 Barb. 548 (1861) and *Neuendorff* v. *Duryea*, 69 N. Y. 557 (1877). The opinion in *Neuendorff* v. *Duryea* relies on *Lindenmuller*.

The other decision cited by the New York Court of Appeals in the *Friedman* case, *People* v. *Havnor*, is predicated upon the decision in *Lindenmuller* which it terms the "leading case in our state upon the subject," as well as upon the *Neuendorff* and *Moses* cases.

It is clear, therefore, that the ultimate precedent for the *Friedman* decision was the *Lindenmuller* case. Let us, now examine that case.

The defendant in the *Lindenmuller* case was indicted for giving theatrical exhibitions on Sunday in violation of 2 R. S. 675, Sec. 70, which characterized "the first day of the week as holy time." He pleaded not guilty, was tried and convicted. The conviction was affirmed on appeal. The text of the opinion is worthy of examination.

The Court opened by asserting that Christianity was part of the common law of the State of New York "to the extent that entitles the Christian religion and its ordinances to respect and protection, as the acknowledged religion of the people." at 560. In discussing the extent to which English common law has been received in New York, the Court rejected the contention that the constitutional guarantee of the free exercise and enjoyment of religious profession and worship is inconsistent with and repugnant to "the recognition of Christianity, as the religion of the people entitled to, and within the protection of, the law." at 561. The Court went on to say that "Christianity may be conceded to be the established religion, to the qualified extent mentioned, while perfect civil and political equality, with freedom of conscience and religious preference, is secured to individuals of every other creed and profession." at 562.

The Court asserted: "The public peace and public welfare are greatly dependent upon the protection of the religion of the country, and the preventing or punishing of offenses against it, and acts wantonly committed subversive of it." at 564-5.[9]

9. But cf. *Burstyn* v. *Wilson*, 343 U. S. 495 (1952) where this Court stated that "the state has no legitimate interest in protecting any or all religions from views distasteful to them * * * It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine." at 505.

Speaking for a unanimous Court, Mr. Justice Allen cited *People* v. *Ruggles*, 8 Johns. 290 (1811), for the principle "that blasphemy against God, and contumelious reproaches and profanity of Christ or the holy scriptures, were offenses punishable at the common law in this state as public offenses." at 565.

The language in Chief Justice Kent's opinion in the *Ruggles* case is paraphrased by Mr. Justice Allen when he points out that "the Constitution does not secure the same regard to the religion of Mahomet or the grand lama as to that of our Saviour, for the plain reason that we are a christian people." at 566. Further, using the same case as his authority, Allen asserted the right of the civil courts and of the legislature to accept the Christian religion "as the religion of the people, as distinguished from the false religions of the world." at 566.

Lindenmuller thus accepts "the christian sabbath, as one of the institutions" of the Christian religion which "may be protected from desecration by such laws as the legislature * * * may deem necessary to secure to the community the privilege of undisturbed worship, and the day itself that outward respect and observance which may be deemed essential to the peace and good order of society, and to preserve religion and its ordinances from open reviling and contempt—and this not as a duty to God, but as a duty to society and to the state." at 567-8.

Finally, the Court reasoned that the Legislature has the right to decree that one day in seven shall be set aside for relaxation and refreshment, and the selection of such day, as a civil institution, is at the option of the Legislature —"but for a christian people, it is highly fit and proper that the day observed should be that which is regarded as

the christian sabbath, and it does not detract from the moral or legal sanction of the law of the state that it conforms to the law of God, as that law is recognized by the great majority of the people."[10] at 569.

Thus, when the highest Court of New York relied upon *Lindenmuller* in its later decisions, including the *Friedman* case, as establishing the proposition that the New York Sunday Law was simply a civil regulation, it disregarded the plain language of the *Lindenmuller* opinion and the basic assumptions upon which that opinion rests. These assumptions are: 1) that Christianity, as part of the common law of England, a country with an established church, was received into the common law of New York; 2) that Christianity is the established religion of the people and, therefore, entitled to special protection; 3) that other religions—characterized as "false religions of the world" —are entitled merely to toleration; and 4) that it is a proper function of the Legislature to protect the Christian Sabbath, as one of the institutions of the dominant religion, from desecration.

Each of these assumptions is inconsistent with the First Amendment as interpreted by this Court in *Everson*, *McCollum*, *Zorach* and *Burstyn* and made applicable to the states by *Cantwell* and *Murdock*.

One of the cases now under consideration by this Court involving the constitutionality of a state Sunday law arises

10. The fact that a statute respecting an establishment of religion favors the religion of the majority, of course, cannot save it from constitutional invalidity. "The 'protection' [of religious freedom] means protection to the minority. The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong, the few against the many." *Board of Education* v. *Minor*, 23 Ohio St. 211, 251 (1872).

in Maryland—*McGowan* v. *Maryland*, 220 Md. 117. An examination of the decision of that State's Court of Appeals upholding the Maryland statute reveals a remarkable parallel with *Friedman* in New York. The Maryland Court stated that it had often ruled, as had other courts, that "the basic purpose of such statutes, with their exceptions, is the civil establishment and regulation of a day of rest from work, not a law respecting the establishment of religion or prohibiting the free exercise thereof, and that the statutes do not offend the First and Fourteenth Amendments to the Constitution of the United States." at 122, 123. Three authorities are cited—two Maryland cases and one New York case. The New York case is *People* v. *Friedman, supra*, which, as has been shown, is based on *Lindenmuller*. The two Maryland cases are: *Judefind* v. *State*, 78 Md. 510 (1894) and *Levering* v. *Board of Park Commissioners*, 134 Md. 48 (1919).

Judefind, a Seventh Day Adventist, was arrested, convicted and sentenced for husking corn on Sunday in violation of Maryland's Sunday law. After he had served 30 days in prison, the Maryland Court of Appeals affirmed the conviction. In upholding the state's Sunday law, it relied upon three earlier decisions of the same Court. *Kilgour* v. *Miles*, 6 Gill & J. 268 (1834); *State* v. *Fearson*, 2 Md. 310 (1852); *Philadelphia, Wilmington and Baltimore R.R.* v. *Lehman*, 56 Md. 209 (1881).

In *Kilgour*, the Court of Appeals stated: "'Ours is a christian community, and a day set apart as the day of rest, is the day consecrated by the resurrection of our Saviour, and embraces the 24 hours next ensuing the midnight of Saturday.'" at 274.

In *Fearson*, the Court, speaking of a violation of the Sunday law, said that "* * * this is a gross offense against decency and public morals, and therefore richly merits punishment." at 313.

In *Philadelphia, Wilmington and Baltimore R.R.*, the Court, speaking of the Sunday laws of the various states, said as mentioned above, [11] that " they are substantially the same in their general scope and provision; * * * all looking to keeping the day sacred and as one of rest from secular employment. * * *" at 227.

The second case cited in *McGowan* is *Levering* v. *Board of Park Commissioners, supra,* in which the Maryland Court of Appeals declared void as violating the state Sunday law, a Baltimore ordinance permitting professional baseball and other games on Sundays. This decision, in upholding Sunday legislation, relies on *State* v. *Fearson* and *Judefind* v. *State,* discussed above, and on *Petit* v. *Minnesota,* 177 U. S. 164 (1900) which will be discussed below.[12]

Here again, the basic assumptions found in the decisions on which *McGowan* is predicated, are in clear conflict with the First Amendment.

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11. See p. 15, *supra.*

12. A third case relied upon is *Barnie's* case, an unreported decision of a lower Maryland Court.

F. Prior Decisions of This Court Discussing Sunday Laws

This Court has never squarely decided the issue raised in this case.

This Court has discussed Sunday laws in three decisions. The first is *Soon Hing* v. *Chief of Police*, 113 U. S. 703, decided in 1885. This case involved the validity of an ordinance adopted by the city of San Francisco, which prohibited any person owning or employed in a public laundry from washing or ironing clothes between the hours of ten in the evening and six in the morning or on Sunday. The appellant, Soon Hing, was found guilty of violating the ordinance by washing and ironing clothes in a public laundry during the prohibited hours on a week day. He thereupon attacked the ordinance as unconstitutional on the ground that it deprived him of his right to labor at all times. Mr. Justice Field, speaking for the Court, upheld the ordinance as applied in that case, noting that the prohibition against labor on Sunday was not involved. Therefore, *Soon Hing* was not a ruling by this Court on the validity of Sunday laws.

However, in dealing with the attack on the ordinance because it deprived the appellant of the right to work at all times, Mr. Justice Field pointed out that such regulations of working hours were constant subjects of legislation and were valid in his view. It was in this context that he said, in what is clearly dictum, that laws setting aside Sunday as a day of rest were upheld by the highest courts of the state "not from any right of the Government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from unin-

terrupted labor." at 710. He commented that such laws "have always been deemed beneficent and merciful laws, especially to the poor and dependent, to laborers in our factories and workshops and in the heated rooms of our cities; * * *" *ibid.*

The Court's attitude was understandable, considering the year of the decision. In those days, there were few laws protecting labor. The seven-day work week and the sun-up to sun-down work day were all too commonplace. Aside from the fact that *Soon Hing* did not decide the validity of Sunday laws, it is doubtful whether this Court would rule the same way if faced with the case today especially in view of the fact that the ordinance attacked was one of many discriminatory measures then aimed at Chinese. See *Gandolfo* v. *Hartman*, 49 F. 181 (1892); CROSS, A HISTORY OF THE LABOR MOVEMENT IN CALIFORNIA, 81-83, 124 (1935).

The second case in which this Court discussed Sunday laws was *Hennington* v. *Georgia*, 163 U. S. 299 (1896). In that case, the superintendent of the Alabama Great Southern Railroad Company was indicted for having operated a freight train on the Sabbath in violation of a Georgia statute. The defendant argued that the statute, as applied in his case, conflicted with Congress' exclusive power to regulate commerce among the states. This contention was overruled and the jury found the defendant guilty as charged. The Supreme Court of Georgia upheld the statute as a valid police regulation, and this Court reviewed that judgment exclusively on the basis of the defendant's claim that the statute conflicted with the Commerce Clause of the Federal Constitution. Hence, the constitutionality of Sunday laws under the First Amendment was not then before the Court.

It is true that in the course of the opinion, the Court said that laws enacted to protect the public health and safety are valid unless they had "no real or substantial relation" to public health or safety or were "a palpable invasion of rights secured by the fundamental law." It was in this connection that the Court expressed the opinion that the Sunday law in question was enacted "to prescribe a rule of civil duty for all who, on the Sabbath Day, are within the territorial jurisdiction of the state." The Court also said, "It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty." at 304. The Court concluded its discussion of this point with the following:

> The Legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation "was of admirable service to a state, considered merely as a civil institution." 4 Bl. Com. 63.

The authority of Blackstone, cited by the Court for the proposition that Sunday laws are a civil regulation, loses its persuasiveness when the cited passage is read in its full context:

> IX. *PROFANATION OF THE LORD'S DAY*, vulgarly (but improperly) called *Sabbath breaking*, is a ninth offence against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for

> public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker.

It should also be noted that the foregoing language appears in BLACKSTONE's COMMENTARIES in Book IV, Chapter 4, entitled "Of Offences Against God and Religion."

With reference to the Court's reliance on the "fundamental law," it should be noted that the opinion does not indicate which provision of the "fundamental law" (other than the Commerce Clause) was the basis for its consideration of the validity of Sunday law. In any event, the discussion of the constitutionality of Sunday laws was dictum.

The fact that the constitutionality of the statute under the Commerce Clause was the sole issue before this Court in the *Hennington* case is also demonstrated by Chief Justice Fuller's dissenting opinion.

> "This statute in requiring the suspension of interstate commerce for one day in the week amounts to a regulation of that commerce and is invalid because the power of Congress in that regard is exclusive. But it is said that the act is not a regulation of com-

> merce but a mere regulation of police, and that the so-called police power of a state is plenary. The result, however, is the same. When a power of a state and a power of the general government come into collision, the former must give way; and as the freedom of interstate commerce is secured by the Constitution, except as Congress shall limit it, the act is void because of the violation of that freedom." at 318-19.

Note that the dissenting opinion makes no mention of the fact that the day of the week on which the running of the freight train was prohibited was Sunday!

In any event, it is doubtful whether this Court would today uphold a state law prohibiting the operation of freight carriers on Sundays.

The third case, *Petit* v. *Minnesota*, 177 U. S. 164 (1900), arose when a barber was convicted of keeping his shop open on Sunday in violation of a Minnesota statute. This statute prohibited all labor on Sunday, excepting work of necessity or charity, and adding a provision that keeping open a barber shop on Sunday was not to be deemed a work of necessity or charity. The appellant attacked the statute on the ground that it was class legislation directed against barbers, and that it deprived him of property without due process of law by prohibiting his business activities on Sunday unlike other trades or occupations.

Chief Justice Fuller, in delivering the opinion of the Court, cited *Hennington* as authority for the statement that the legislature has the power to enact laws prohibiting work and labor on Sunday, for which we have already shown *Hennington* is not a precedent. The opinion then dealt exclusively with the actual issue of the case, namely

whether the statute contained an unreasonable discrimination and, therefore, violated the Fourteenth Amendment.

Finally, it should be noted that all three of these cases were decided by this Court before the First Amendment was held applicable to the states through the Fourteenth Amendment. Hence, in these three cases the Court had no occasion to consider the issue presented by the case at bar, which is whether state laws prohibiting Sunday activities constitute an establishment of religion or a prohibition of the free exercise thereof, in violation of the First Amendment to the Constitution.

In 1951 this Court had an opportunity to consider this question in *Friedman* v. *People of the State of New York*, when an appeal was taken from a New York Court of Appeals decision upholding the validity of a Sunday law against an attack predicated upon the First Amendment. *People* v. *Friedman*, 302 N. Y. 75 (1950). This Court dismissed the appeal without opinion "for the want of a substantial federal question." 341 U. S. 907.[13]

II—Laws barring labor, business or work on Sundays violate the First Amendment's guarantee of freedom of religion.

A. Aid to Majority Religions an Impairment of Religious Freedom

The purpose of both the "establishment" and "free exercise" clauses of the First Amendment is to assure religious freedom. This Court in *Everson* characterized these two clauses as "complementary" and reaffirmed their

13. But see pages 19-22, *supra*, for discussion of the cases relied on by the Court of Appeals in the *Friedman* case.

interrelationship. 330 U. S. at 15. The objective of the First Amendment was there declared to be to secure "religious liberty from the invasion of the civil authority." *ibid.*

Thus, the First Amendment places religious beliefs, observance and worship completely beyond the competence of the Federal Government. This was not done as an expression of hostility to religion; but upon the "premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education, supra,* at 212. As Mr. Justice Frankfurter wrote in his concurring opinion in *McCollum, supra,* (at 232): "We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion," citing *Everson v. Board of Education,* 330 U. S. at 59.

The "liberty" guaranteed to every person by the Fourteenth Amendment against deprivation without due process of law, places the state governments in the same position as the federal Government with respect to their incompetence to legislate on religious beliefs, observance or worship. *Cantwell* v. *Connecticut, supra; Murdock v. Pennsylvania, supra; McCollum* v. *Board of Education, supra.*

When the state aids and supports specific religious denominations by selecting their day of worship as the day for general observance, the status and dignity of the other religions are thereby impaired.

Adherents of minority religious groups, and particularly their children, are constrained in the free and open practice of their religious rites when the state places its

stamp of approval upon the religious practices and customs of the religious group which happens to be in the majority. Thus, an inferior status is imposed by the state upon some religions, and the First Amendment's guarantee of religious freedom is violated.

This concept of inferior status for some religions has unfortunately found support from dicta in court decisions, such as the statement by Mr. Justice Brewer in *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457, 472 (1892) "* * * this is a Christian nation." At this date, it requires no argument to establish that any such concept is wholly irreconciliable with the language and the spirit of the First Amendment and the basic political philosophy upon which our government was founded. Yet such erroneous concepts are nurtured by state enactments, like Sunday laws, which place the momentum of the civil authority behind one of the institutions of Christianity.

B. Imposed Conformity with Sectarian Conduct

Sunday laws do not prohibit work on the original Biblical Sabbath, the seventh day of the week, but on Sunday the first day of the week. This substitution of the first day for the seventh day as the holy day took place in the early centuries of Christianity. Sunday, the first day in the week, is called the Lord's day because it commemorates the resurrection of Jesus, a religious event of deep significance to Christians, but of no religious meaning to the Jewish and other non-Christian religions. 21 ENCYCLOPEDIA BRITANNICA 565, 19 ENCYCLOPEDIA BRITANNICA 787 (1959 ed.).

The effect of Sunday laws is to compel those who do not believe in the divinity of Jesus or the Resurrection,

outwardly to conduct themselves as though they do. Refraining from work and from many forms of recreation, under sanction of a civil ordinance, is a compulsory symbol of respect comparable to kneeling, crossing one's self or uncovering the head as in Christian forms of worship.

State imposed restrictions on work, business or labor on Sundays is offensive to Jews, Seventh Day Adventists, Seventh Day Baptists and to adherents of other non-Christian religions. As Mr. Justice Jackson stated eloquently in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

C. Sunday Laws and Economic Coercion

When the state imposes restrictions upon work or labor that may be performed on Sunday, it not only provides special protection for the Christian sects which celebrate Sunday as their holy day, but it also places an economic penalty upon Jews and upon those Christian denominations that observe Saturday as the Sabbath, to the prejudice of the latter groups. By denying to such minority religious groups the liberty to work, shop or labor on Sunday, the law clearly deprives them of the productive use of one day which is available for such use to the majority religious groups. In other words, where a retail establishment belonging to a Christian may be open for

business six days a week, a similar establishment belonging to a competitor who observes the Jewish Sabbath can be open only five days a week. *Johns* v. *State*, 78 Ind. 332 (1881).

In addition, this case highlights the plight not only of the Jewish merchant but also of his Jewish patron who works for a living during the customary five weekdays, worships on his Sabbath and is barred by the Massachusetts Lord's Day Act from shopping on the only day available to him for that purpose. The five-day work week is becoming increasingly widespread in our industrial economy. One of the principal advantages of this arrangement of the work week is that it allows the worker to spend one full day of the weekend for his shopping and attending to his personal affairs. Saturday has become the main shopping day of the entire week. Orthodox Jews cannot shop on Saturday. The state by enacting Sunday laws, prevents them from doing their shopping on the only day of the weekend which would be available to them for that purpose. Nor is this a hypothetical situation. The facts in this case clearly establish that a real hardship is being imposed upon the Orthodox Jewish customers of the corporate plaintiff.

III—Laws barring labor, business or work on Sundays violate the Fourteenth Amendment's guarantee of equal protection of the laws unless they exempt those who observe a different day as their holy day.

The Fourteenth Amendment provides in Section 1 that:

> No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.

This provision clearly prohibits the state and all its political subdivisions from discriminating against any person or group of persons because of their religious conviction or affiliation. This was affirmed by this Court in *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), where Jehovah Witnesses were denied protection equal to that provided for the dominant religions. That was discrimination barred by the First and Fourteenth Amendments. *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953). In *Fowler* this Court condemned state action which discriminated against a small, unpopular religious sect with respect to the use of a public park for meeting purposes.

It has been shown above in the discussion of the "establishment" clause of the First Amendment, that Sunday legislation amounts to state endorsement of the holy day of certain Christian denominations and thus preference for such Christian denominations over other religious sects which observe some other day as their holy day. By the same token, Sunday legislation violates the "equal protection" clause of the Fourteenth Amendment since the state, by preferring the holy day of one religion, necessarily discriminates against all others.

Also, as has been shown above, Sunday laws impair the freedom of religion of those who do not commemorate the resurrection of Jesus, by compelling them to conduct themselves on Sundays as if they did. Furthermore, it has been shown that these laws place observant Jews, both businessmen and customers, at an economic disadvantage.

All these arguments compel the conclusion that Sunday laws discriminate against Jews and others who do not observe the Christian holy day, and thus deny them the equal protection of the laws required by the Fourteenth Amendment.

The discriminatory aspect of Sunday legislation has been recognized by those states which provide an exception for persons who observe some other day as their Sabbath and refrain from work or labor on such day.[14] Clearly, any state Sunday law must provide an exception as broad as the prohibition for those who observe a different day as their holy day, to comply with the Fourteenth Amendment's "equal protection" clause.

Massachusetts is one of the states which has an exception in Sec. 6 of Ch. 136 of the Massachusetts General Laws:

> Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby.

In interpreting this provision, however, the Massachusetts Supreme Judicial Court has ruled that the exception for "secular business" does not apply to keeping a store open

14. See footnote 7, *supra*.

on Sunday. *Commonwealth* v. *Has*, 122 Mass. 40 (1877). Under this interpretation by the highest state court, an observant Jew who keeps his shop open on Sunday violates the law. Hence, the exception set forth in Sec. 6 is not as broad as the prohibition and cannot save the statute from invalidity under the "equal protection" clause of the Fourteenth Amendment. This is true, independent of any consideration under the First Amendment.

Conclusion

State laws barring labor, business or work on Sundays are unconstitutional. The decision below holding the Massachusetts Lord's Day Act unconstitutional, under the First and Fourteenth Amendments, should therefore be affirmed.

Respectfully submitted,

FREDERICK F. GREENMAN
New York, New York
Attorney for
American Jewish Committee

BERNARD NATH
Chicago, Illinois
Attorney for
Anti-Defamation League of B'nai B'rith

Amici Curiae

ABRAHAM BLUMBERG
ARNOLD FORSTER
PAUL HARTMAN
THEODORE LESKES
EDWIN J. LUKAS
SOL RABKIN
New York, New York
Of Counsel

New York, N. Y.
October 25, 1960

APPENDIX

(The Statute Involved)

MASSACHUSETTS GENERAL LAWS ANNOTATED
CHAPTER 136

OBSERVANCE OF THE LORD'S DAY

Section 1. Lord's day, definition.

The Lord's day shall include the time from midnight to midnight.

Section 2., Presence at games, sports, plays or public diversions on the Lord's day; exceptions.

Whoever on the Lord's day is present at a game, sport, play or public diversion, except a concert of sacred music, a public entertainment duly licensed as provided in section four or a free open air concert given by a town, or by license of the mayor or the selectmen, upon a common or public park, street or square, or except a game of golf conducted on an open air golf course, or except a game of tennis or dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing, or except after one o'clock postmeridian a game of outdoor lawn bowling or the playing of golf or driving on an outdoor golf driving range or playing on a miniature golf course, so called, shall be punished by a fine of not more than five dollars. Whoever on the Lord's day takes part in any game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not more than fifty dollars. This and the following section shall not apply to amusement enterprises lawfully conducted under section four A or four B or to sports or games conducted in accordance with sec-

tion twenty-one to twenty-five, inclusive, in any city or town which accepts said sections or in accordance with sections twenty-six to thirty-two, inclusive, in any city or town in which said sections twenty-six to thirty-two are then in force. As amended St. 1933, c. 150, sec. 1; St. 1934, c. 63; St. 1935, c. 78; St. 1946, c. 207, sec. 1; St. 1955, c. 255, sec. 1; St. 1956, c. 11; St. 1956, c. 242; St. 1956, c. 256.

Section 3. Establishing and maintaining public entertainment on the Lord's day.

Whoever offers to view, sets up, establishes, maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining any public entertainment on the Lord's day, except as provided in section two, unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four, or whoever on the Lord's day acts as proprietor, manager or person in charge of a game, sport, play or public diversion, except a public entertainment licensed under section four and except as provided in section two, shall be punished by a fine of not more than five hundred dollars. As amended St. 1955, c. 255, sec. 2.

Section 4. License to hold public entertainment on the Lord's day; application; fee; suspension; revocation; hearing.

Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such

terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, including musical entertainment provided by mechanical or electrical means, in keeping with the character of the day and not inconsistent with its due observance, whether or not admission is to be obtained upon payment of money or other valuable consideration, and, if the proposed entertainment described in the application is solely for the exhibition of motion pictures for the benefit of patrons in a public dining room or for the use of television, the use of radio, or musical entertainment provided by mechanical or electrical means, the mayor or selectmen may grant an annual license therefor; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. The application for the approval of the proposed entertainment by the commissioner shall be accompanied by a fee of two dollars, or, in the case of an application for the approval of an annual license, as herein provided, by a fee of fifty dollars. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. The foregoing provisions, insofar as they authorize any person to refuse to grant, or to suspend, revoke or annul a license upon the ground that the proposed entertainment is not in keeping with the character of the Lord's day or not consistent with its due observance, and insofar as they require written approval of the proposed entertainment by said commissioner, shall not apply to any person making an application for a license

to exhibit motion pictures or for the use of radio or television on said day, nor to any license issued upon such application. As amended St. 1945, c. 575; St. 1953, c. 596; St. 1954, c. 303; St. 1955, c. 742; St. 1956, c. 157; St. 1957, c. 300.

Section 4A. Maintenance and operation of enterprises at amusement parks, beaches or resorts on the Lord's day; licenses; suspension; revocation.

The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe, may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely: Bowling alleys, shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre, photographic galleries or studios in which pictures are made and sold, games, and such amusement devices as may lawfully be operated therein on secular days; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed enterprise shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as provided in the case of public entertainments under section four. Any licensee hereunder may distribute premiums or prizes in connection with any game or device lawfully maintained and operated by him under authority hereof. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commis-

sioner, be suspended, revoked or annulled by the officer or board giving the hearing. So much of this section as relates to the maintenance and operation of bowling alleys shall not apply in any city or town which shall have accepted the provisions of section four B. Added St. 1933, c. 150, sec. 2, as amended St. 1933, c. 309, sec. 1; St. 1946, c. 207, sec. 2.

Section 4B. Licenses for operation of bowling alleys on the Lord's day.

In any city which accepts this section by vote of its city council and in any town which accepts this section by vote of its inhabitants, the city council, with the approval of the mayor, or the selectmen, as the case may be, may grant licenses for the operation of bowling alleys on the Lord's day between the hours of one and eleven post meridian; provided, that no such license may authorize the operation of bowling alleys on Easter, or on Christmas day if such day falls on the Lord's day. Every license granted hereunder shall specify the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Bowling alleys operated under such licenses shall be operated subject to such regulations and restrictions as shall be prescribed from time to time by the city council, with the approval of the mayor, or by the selectmen. Said regulations and restrictions shall be stated in the license. Said licensing authorities may at any time and without previous notice revoke licenses issued under this section if they have reason to believe that any provision of this section, or of any regulation or restriction prescribed thereunder, is being or will be violated. Added St. 1946, c. 207, sec. 3.

Section 5. Keeping open shops or warehouses and conducting business or doing work on the Lord's day.

Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

Section 6. Limit of operation of section 5.

The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale

of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in

interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains

from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. As amended St. 1932, c. 96; St. 1933, c. 150, sec. 3; St. 1934, c. 328, sec. 7; St. 1934, c. 354; St. 1934, c. 373, sec. 6; St. 1936, c. 129; St. 1937, c. 286; St. 1938, c. 143; St. 1943, c. 473; St. 1946, c. 207, sec. 4; St. 1949, c. 190; St. 1950,

c. 256, sec. 1; St. 1950, c. 322; St. 1950, c. 681; St. 1951, c. 504; St. 1954, c. 217; St. 1955, c. 304; St. 1957, c. 356, secs. 16, 17.

Section 7. Sale of frozen desserts, frozen dessert mix or confectionery on the Lord's day.

In Boston, and in any other city or town which accepts this and section eight or has accepted corresponding provisions of earlier laws, in a city by its city council or in a town by the voters of the town at an annual town meeting, the licensing board or officer in such city or town, or if there is no such board or officer the aldermen of a city, or if there are no aldermen the city council, with the approval of the mayor, or the selectmen of a town, may grant, to any reputable person who on secular days is a retail dealer in frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit and who does not hold a license for the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, a license to keep open his place of business on the Lord's day for the sale of frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit. As amended St. 1934, c. 328, sec. 8; St. 1934, c. 373, sec. 7; St. 1957, c. 356, sec. 18.

Section 8. Provisions of licenses to sell frozen desserts, ice cream mix or confectionery on the Lord's day; fee; revocation.

Every license granted under the preceding section shall specify the street or place and the number, if any, or if there is no number, the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Such licenses shall

expire on April thirtieth of each year; but they may be granted during April, to take effect on May first following. The fee for such license shall not be more than five dollars a year, and it may be suspended or revoked by the officer or board granting the same. As amended St. 1937, c. 124.

Section 9. Permit for performance of necessary work or labor on the Lord's day.

The police commissioner of Boston, or any member of the police department having a rank not lower than that of captain and designated by said commissioner, or the chief of police or other officer in charge of the police department of any other city or of any town, or the chairman of the board of selectmen of any town, upon such terms and conditions as he deems reasonable, may issue a permit for the performance on the Lord's day of necessary work or labor which in his judgment could not be performed on any other day without serious suffering, loss, damage or public inconvenience. Such permit shall cover not more than one day and shall not be issued more than six days prior to the day for which it is issued. As amended St. 1953, c. 108.

Section 10. Parades with music on the Lord's day.

Any post or camp of an incorporated organization of veterans of any war in which the United States has engaged, or any incorporated civic or fraternal organization, may parade with music on the Lord's day for the purpose of attending divine service, holding commemorative exercises or dedicating memorials; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held.

Section 11. Parades of policemen or firemen with music on certain Sundays.

Any company or association of policemen or firemen, whether in active service or former members of a police or fire department, may parade with music, in the case of policemen, on policemen's memorial day, the first Sunday of June in each year, and, in the case of firemen, on firemen's memorial day, the second Sunday of June in each year, for the special purpose of decorating the graves of deceased policemen or firemen, as the case may be; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held.

(*NOTE:* The remaining sections of Chapter 136—sections 12 to 32—are omitted because they have no relevance to the arguments made in this brief.)

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Supreme Court of the United States

October Term, 1960

No. 11

GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, *et al.*,

Appellants,

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., *et al.*,

Appellees.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS, *AMICI CURIAE*

REUBEN GOODMAN,
One State Street,
Boston 9, Massachusetts.

SAMUEL S. ROBINSON,
10 State Street,
Boston 9, Massachusetts.

ROWLAND WATTS,
% American Civil Liberties Union,
156 Fifth Avenue,
New York 10, New York,
Counsel for Amici.

INDEX

	PAGE
INTEREST OF AMICI	1
THE STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. The origin, avowed purpose, legislative history and judicial interpretations of the statute attest to its religious purpose	2
A. The Origins of Chapter 136 are Religious	2
B. The Avowed Purpose of General Laws, Chapter 36, "Observance of the Lord's Day", is Religious	3
C. The Legislature has Remained Committed to the Retention of Chapter 136 as a Religious Law	6
D. Judicial Decisions Have Determined the Scope and Applicability of the Lord's Day Laws From Their Religious Basis	11
II. The Lord's Day Law is a law respecting an establishment of religion and, therefore, in violation of the Fourteenth Amendment of the United States Constitution as it incorporates the First Amendment	15
CONCLUSION	17
APPENDIX	18

Table of Cases

	PAGE
Bennett v. Brooks, 9 Allen 118	15
Burstyn v. Wilson, 343 U. S. 495	16
Carton v. Shea, 312 Mass. 634	15
Civil Rights Cases, 109 U. S. 3	17
Commonwealth v. Dextra, 143 Mass. 28	11
Commonwealth v. Has, 122 Mass. 40	11, 15
Commonwealth v. McCarthy, 244 Mass. 484	13
Commonwealth v. White, 190 Mass. 578	11
Davis v. Beason, 133 U. S. 333	15
Davis v. Somerville, 128 Mass. 594	14
Donovan v. McCarthy, 155 Mass. 543	14
Doyle v. Lynn & Boston R. R. Co., 118 Mass. 195	14
Everson v. Bd. of Education, 330 U. S. 1	16
Kimball v. Thompson, 13 Mass. 283	14
McGrath v. Merwin, 112 Mass. 467	14
McLeod v. Dilworth, 322 U. S. 327	17
The Propeller Genessee Chief, 12 Howard 443	17
Securities Commission v. Chenery Corp., 318 U. S. 80	16
Smith v. Boston & Maine R. R., 120 Mass. 490	14
Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143	11
Stone v. Graves, 145 Mass. 353	14
Zorach v. Clauson, 343 U. S. 305	15

Massachusetts Statutes

	PAGE
Act of 1692 (Massachusetts Bay Province Acts, 1692-1695), Ch. 22	4
Provincial Statutes of 1760-1761, Ch. 20	12
Act of 1782, Ch. 23	4, 5
Statute 1791, Ch. 58	12
Revised Statutes of 1836 (Ch. 50)	3, 5
Acts of 1844, Ch. 160	5
General Statutes, 1860, Ch. 84	4
Public Statutes, 1882, Ch. 98	4
Revised Laws, 1902, Ch. 98	4
Acts of 1911, Ch. 328	6
Acts of 1913, Ch. 619	9
General Laws, 1921, Ch. 136	4
General Laws, 1932, Ter. Ed., Ch. 136	4
General Laws, 1932, Ter. Ed. Ch. 276	6
General Laws, Ter. Ed., Ch. 277	6
Acts of 1955, Ch. 304	4

Miscellaneous

House Document No. 125, Massachusetts Legislative Documents, 1851	8
Report of the Joint Special Committee to Revise the Lord's Day Law, House Document 1160 of 1907	5, 8
Report of the Legislature on the Observance of the Sabbath (1814)	3
F. I. Bronner, Observance of the Lord's Day, 1800 to 1865 (Unpublished PhD. Thesis, Harvard College Library)	6
Works of William Ellery Channing (Boston, 1877)	7
H. C. Cowan, The Sabbath in Scripture and History	4
Encyclopedia Brittanica, 11th Ed.	4
George S. Gray, Eight Studies of the Lord's Day (Cambridge 1884)	4
The Power of the Legislature to Enact Sunday Laws (Northampton, 1870)	5

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS, *AMICI CURIAE*

Interest of *Amici*

This Brief is presented with the consent of the parties, filed with the Clerk of this Court. The American Civil Liberties Union and its affiliate, the Civil Liberties Union of Massachusetts, regard the separation of Church and State as fundamental to a pluralistic democratic society. We are, therefore, concerned that governmental sanctions should not be imposed from religious considerations.

The Statute Involved

Massachusetts General Laws (Tercentary Edition) Chapter 136, Sections 5 and 6, entitled "Observance of the Lord's Day." These are set out in the Appendix to this Brief (p. 18).

Statement of the Case

The facts are fully set forth in the briefs of the parties. Appellees, a Massachusetts corporation which operates a Kosher butcher and grocery market, three Orthodox Jewish customers of the market appearing as representatives of a class, and the Chief Orthodox Rabbi of Springfield appearing as representative of the Massachusetts Council of Rabbis, sought to enjoin as applied to themselves and their classes the enforcement of the Massachusetts "Lord's Day" statute as violative of the Federal Constitution. A statutory three-judge court granted the relief prayed. On appeal, this Court noted probable jurisdiction on April 25, 1960.

Summary of Argument

An analysis of Chapter 136 demonstrates that it establishes a religious institution. This is clear from its origin, its avowed purpose, its history, both legislative and judicial, including the controversies which have been stirred by it; and the response of the Legislature to those controversies. It is a law respecting the establishment of religion and, therefore, in violation of the Fourteenth Amendment of the United States Constitution. It cannot be saved by this Court incorporating into it a secular utility.

ARGUMENT

I. The origin, avowed purpose, legislative history and judicial interpretations of the statute attest to its religious purpose.

A. The Origins of Chapter 136 are Religious.

It is generally conceded that the Seventeenth and Eighteenth Century origins of the Lord's Day Laws are religious (p. 43, Appellant's Brief; Record pp. 62-63, and

154).[1] This is obvious from an inspection of any of the solemn preambles to the various early statutes cited in Judge Magruder's Opinion, Record pp. 139-140.

The religious character of the Lord's Day Laws was explicitly recognized by the Legislature in 1814 (See Report of the Legislature on the Observance of the Sabbath, p. 7). In that year it adopted a measure:[2]

> "That each minister be requested to read in his pulpit, on the Sabbath, the existing laws, for the due observance of the Lord's Day, and to address the people on the subject; pointing out as fully and explicitly as the occasion and the circumstances of his people may require, according to his own judgment, the importance and value of the Sabbath, and the reasons which bind us to observe it, and to obey the laws of the Commonwealth. * * *"

The Report of the Committee which recommended this measure stated (p. 6):

> "We believe that without the appointment and continuance of the Lord's Day, public instruction and worship would soon languish, and perhaps entirely cease; that private worship and the best virtues of social life would share the same fate; that the scriptures, containing the records, the principles, the duties, and the hopes of our religion, would soon pass from the recollection of multitudes of our citizens. * * *"

B. The Avowed Purpose of General Laws, Chapter 36, "Observance of the Lord's Day", is Religious.

"Observance of the Lord's Day" has been the designation of the Lord's Day Law from the Revised Statutes of 1836 (Chapter 50) through the various revisions and com-

[1] For the English origins of the Lord's Day Laws see A. H. Lewis "Sunday Legislation" (N. Y. 1902).

[2] Harvard College Library, U. S. 12670.75.

pilations of the Massachusetts law. (General Statutes, 1860, Chapter 84; Public Statutes, 1882, Chapter 98; Revised Laws, 1902, Chapter 98; General Laws, 1921, Chapter 136; General Laws, 1932, Ter. Ed., Chapter 136). In fact this title goes back further. The Act of 1692 (Massachusetts Bay Province Acts, 1692-1695, Chapter 22) is entitled "An Act For The Better Observance And Keeping Of The Lord's Day", and the compilation of 1782 is entitled "An Act For Making More Effectual Provision For The Due Observation Of The Lord's Day, And For Repealing The Several Laws Heretofore Made For That Purpose." In the Act of 1782, Chapter 23, Section 6, The "Lord's Day" is referred to as "Holy Time". The designation "Lord's Day", as the Appellant's Brief points out (p. 3), has been consistently used in Lord's Day legislation since 1647; and, indeed, it is the designation employed by the Legislature in its most recent enactments. For example, Acts of 1955, Chapter 304, is entitled, "An Act Authorizing The Sale Of Live Bait On The Lord's Day."

The term "Lord's Day" has a religious and Christian content confirmed by 2000 years of association with the most significant event in Christian history. Writing in 1948, the Reverend Horace C. Cowan traces the phrase from Revelations and characterizes it as "the scriptural name of the first day of the week * * * the Lord's Day is so-called because of the resurrection of the Lord Jesus Christ from the dead on that day." (Reverend H. C. Cowan "The Sabbath in Scripture and History", p. 98). See also Encyclopedia Brittanica, 11th Ed. Vol. 26, p. 94. George S. Gray in his "Eight Studies of the Lord's Day", p. 3 (Cambridge, 1884), points out that "Lord's Day" is a religious term not only in theological discussion but in lay conversation:

> "The Lord's Day is a third name, essentially Christian. It comes from the New Testament. It is very seldom used by any who are not believers of the Lord Jesus Christ * * * If in any company one should mention Sunday, the use of that name would

> afford no hint whatever of the person's religious position * * * If, however, one spoke of the Lord's Day, all would suppose that he who uttered this name was a believer. Indeed, the natural inference would be that all were believers. For even a believer would not be apt to use this name except in addressing those of similar faith."

The use of the designation "Lord's Day" has not passed unnoticed. A pamphlet originally prepared in 1869 for a meeting of the Free Congregational Society of Florence, Massachusetts, entitled "The Power of the Legislature to Enact Sunday Laws" (Northampton, 1870, Harvard Law School Library), notes that:

> "The title to our present statutes show the object to be the enforcement of a religious idea. It is 'the observance of the Lord's Day * * * of the Lord's Day which comes from the Christian Church and has connected with it a religious idea * * * and so far as the statute goes it enforces the sacredness attached to the day by a portion of the Christian Church."

In 1907 a Joint Committee of the Massachusetts Legislature to consider the Lord's Day Law suggested, among its recommendations for secularizing the law, that the designation of the statute be changed from the "Lord's day" to "Sunday" (Report of the Joint Special Committee, February 1907, Massachusetts Legislative Documents, (1907) House Document 1168, p. 9). No such action has ever been taken.

The Legislature has never designated by express provision the "Lord's Day" as the first day of the week though the duration of the day is fixed by Section 1 from midnight to midnight.[3] In the religious context of its origin, no

[3] Acts of 1844, Chapter 160, Section 2. Prior to that, the Lord's Day had extended from midnight to sunset (R. S. 1836, Chapter 50, Section 5, Statute 1782, Chapter 23, Section 6).

such designation was necessary since it was obviously the day of worship by the dominant Christian sects. It is interesting to speculate what a court would do if Sabbatarian sects became a majority in Massachusetts and argued that the Lord's Day must be interpreted as the day generally set aside for worship which would then be the seventh day.

Significantly, the Legislature has confined the designation "Lord's Day" to Chapter 136 and its predecessors, and to the form of indictment provided for violation of Chapter 136 found in Chapter 277, Section 79. Other provisions of the General Laws which do not seem to have the religious purpose of General Laws 136 refer to the first day of the week by its civil name—Sunday—rather than the Lord's Day; e. g., Chapter 276, Section 64, relating to bail on Sunday.

A further indication that the Legislature conceived the "Lord's Day" as a religious day is the provision for the sale from 6 to 10 in the morning, of kosher meat "by any person who, according to his religious belief, observes Saturday as the Lord's Day." (Acts of 1911, Chapter 328.) Obviously, "Lord's Day" in that context has religious signification.

C. The Legislature has Remained Committed to the Retention of Chapter 136 as a Religious Law.

As Massachusetts entered the Nineteenth Century, Puritanism began to give way increasingly to an open society of many sects and creeds; and there was increasing protest against the compulsive sanctions of the Lord's Day Laws. The Quakers and the Unitarians were among the earliest of these dissenters (F. I. Bronner, "Observance of the Lord's Day, 1800 to 1865," p. 70, unpublished PhD. Thesis, Harvard College Library). They believed, as Lucretia Mott put it, in the "consecration of man" and not the "consecration of days." (Proceedings of the Anti-Sabbath Convention held in Boston, 1848, p. 94.)

About 1829 William Ellery Channing, in his "Remarks on Associations", deprecated Lord's Day legislation believing that observance of the Lord's Day was a matter in which "the individual must be his own judge." (Works of William Ellery Channing, Boston, 1877, pp. 155-158.) He characterized the ritualistic character of some Lord's Day observances as superstition (p. 158). Theodore Parker couched this objection in stronger language in the Resolutions he introduced at the Anti-Sabbath Convention of 1848. (Proceedings, p. 50.)

William Lloyd Garrison, writing in the Liberator in 1836, was not opposed to voluntary religious observance of the first day of the week, but was:

> "decidedly of opinion that every attempt which is made to enforce the observance as a peculiar 'holy day' by pains and penalties whether civil or ecclesiastical is positive tyranny, which ought to be resisted by all the Lord's freemen, all who are rejoicing in the glorious liberty of the sons of God."
>
> (Cited in *William Lloyd Garrison by his children*, Volume 2, pp. 111-112, 1835-1840.)

In 1851 a group filed a petition with the Massachusetts House of Representatives for the repeal of all Lord's Day Laws. Their reasons reminiscent of the Anti-Sabbath Convention of 1848 were:

> "1. Because there exists among the people an equally honest and conscientious difference of opinion as to the holiness of particular days, and the mode of their observance;
>
> 2. Because it is contrary to the fundamental idea of a republican government, that conscience should be coerced into conformity by law, or that special rights and privileges should be given to a particular religious belief;
>
> 3. Because the question of the holiness of days,—like that of public worship, the support of the clergy,

the observance of ordinances,—should be left in its decision to individual conscience, and made to depend on its own merits, without the intervention of the state; and

4. Because, as it has been found safe, politic and beneficial to allow the people to decide for themselves in all other religious matters, there is no reason to doubt that the same good results would follow the repeal of the Sabbatical Laws."

(House document No. 125, Massachusetts Legislative Documents, 1851.)

The Committee on the Judiciary of the House of Representatives recommended that the petition be rejected, concluding as follows:

"But they [the Committee] cannot leave the subject [observance of the Lord's Day] without expressing their reverent respect for a social and religious institution, handed down to us by pious men from the time of the Apostles, throughout all the long ages of the Christian Church, and still venerated in every part of Christendom." (*Ibid.*)

The House accepted the Report of the Committee on April 21, 1851 (House Journal, 1851, p. 566).

However, additional forces were at work. The urbanization and industrialization of Massachusetts during the Nineteenth Century hardly requires documentation. Consequently, an experiment in the rigid enforcement of the Lord's Day law in Boston at the end of 1906 resulted in a public outcry. (Press Comments appended to Report of Joint Special Committee to Revise the Lord's Day Law, p. 91, House Document 1160 of 1907—and this in spite of some exceptions in 1887 (Acts of 1887, Chapter 391).) Meanwhile a Joint Special Committee had been appointed by the Legislature to "revise, consolidate and arrange the General Laws of the Commonwealth relating to the observance of the Lord's Day." (House Document No. 1160 Massachusetts Legislative Documents, 1907.) The majority

of the Committee recommended a secularization of the law. They suggested that the name "Sunday" should be substituted for "Lord's Day"; and that the day be used as a day of rest (p. 9). The Committee thus recommended legislation to provide one day of rest in seven for all employees—those who were obliged to work on Sunday as well as those who did not work on Sunday (p. 9). The Committee also recommended the opening of libraries and museums for which no admission fee was charged (p. 14), and that the exception for "works of necessity and charity" should be broadened to "works of necessity or charity, and works or acts needful during the day for good order, health, safety or comfort of the community (p. 13)."

The Legislature in 1908 paid little attention to these recommendations. It refused to pass a day of rest law (House 336—Massachusetts Legislative Documents, 1908).[4] It also refused to pass a law to keep open public libraries on Sunday (House 339—Massachusetts Legislative Documents, 1908).[5] The only changes made in what are now Sections 5 and 6 were a few additional exceptions for clam digging, dressing fish, taking photographs, unpaid labor on yachts and boats, and the delivery of ice cream. This episode documents the observation of Professor Mark De Wolfe Howe in the Boston Globe, June 2, 1959, p. 27, commenting on the court below's decision in this case:

> "For 100 years, as Judge Magruder points out in his opinion, the General Court has refused to do anything more constructive than undermine an ancient and no longer tolerable policy of preferential establishment by creating exceptions to the general prohibition against secular activities on the Lord's Day."

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[4] It was not until 1913 that the predecessor of Chapter 149, Section 48 provided a day of rest for all employees, was passed. Acts of 1913, Chapter 619, Sections 1, 6.

[5] Query: whether the attendants at the Harvard Law School Library which is open on Sundays from 2:00 to 10:00 are not presently in violation of the law?

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washing establishments during certain
)8); which would have permitted the all
l (House 2007) (bread may now be sold
und from 4 to 6:30 P. M.); which would
ıe sale of alcoholic beverages at bars and
1587) (it may now be consumed only
would have permitted the sale and return
rs of farm products (S-233); and which
tted hunting (House 1844). This seems
titude of the Legislative Commission
to "investigate and study the provisions
ng to observance of the Lord's Day."
recommended that no changes be made,
eport as follows (House 2413—Massa-
ve Documents 1954—p. 9):

opinion that further secularization of the
is undesirable, and for that reason we
ommend that the laws pertaining thereto
liberalized. The wave of materialism
weeping the country makes it most im-
it one day be set aside for worship, rest
all persons an opportunity to strengthen
of our American civilization—the home."

D. Judicial Decisions Have Determined the Scope and Applicability of the Lord's Day Laws From Their Religious Basis.

The Supreme Judicial Court, even after *Commonwealth* v. *Has*, 122 Mass. 40, has referred to the religious basis of the Lord's Day Laws as the touchstone for determining "rights and liabilities" under it. (*Society for Savings in the City of Cleveland* v. *Bowers*, 349 U. S. 143, 151.) Like the Legislature, the Supreme Judicial Court has been faced through the years with the issue of exceptions to the broad prohibition of Section 5. The Legislature has dealt with this issue, as indicated, by imposing a number of Nineteenth and Twentieth Century exceptions on the Seventeenth and Eighteenth Century base. The Supreme Judicial Court, however, has dealt with the problem in terms of the application and scope of the exception for "charity and necessity." Here, too, the religious origin and context of the phrase has been decisive. This is made explicit in *Commonwealth* v. *White*, 190 Mass. 578, decided in 1906, 29 years after *Commonwealth* v. *Has*. The Court there held that picking cranberries on Sunday was not a work of necessity although the crop was unusually large. In that case the Court began its analysis as follows:

> "In construing this statute it is to be borne in mind that, so far as material to the question before us, it is simply the continuation of a law which from a very early time in the history of the Colony has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance are set forth in the various preambles to those statutes."

The court then recites the preambles to the Provincial Statutes of 1760-1761, Chapter 20, Section 1, and to Statute 1791, Chapter 58:

Provincial Statutes of 1760-1761, Chapter 20, Section 1:

> "Whereas it is the duty of all persons, upon the Lord's day, carefully to apply themselves publicly and privately, to religion and piety, the prophanation of the Lord's day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons."

Statute 1791, Chapter 58:

> "Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society; to the great disturbance of well disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life."

The court then went on to say:

> "But changes in the view of people as to the nature of the Lord's day, or as to the manner in which it should be spent, whether such changes are for the better or for the worse, are not to be considered. So far as respects such changes alone the word 'necessity' has the same meaning as when first inserted in this system of statutes. It was originally inserted to secure the observance of the Lord's day in ac-

> cordance with the views of our ancestors, and it ever since has stood and still stands for the same purpose. In interpreting it, the precepts set forth in the preambles above quoted must still be borne in mind."

This case is cited in *Commonwealth* v. *McCarthy*, 244 Mass. 484 (1923), which held that the delivery of bread outside a baker's premises on Sunday is not a work of necessity. The Court said at page 486:

> "The statute prohibiting the performance of labor, business or work, except works of necessity and charity, on Sunday, was enacted to secure respect and reverence for the Lord's day. 'That the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements * * * Whatever inconvenience might result at the present day from the literal and general enforcement of the Lord's day act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute.' *Davis* v. *Somerville*, 128 Mass. 594, 596."

The result of such religious interpretation has been a plethora of distinctions no more amenable to rationalization than those made by the Legislature.

In *Commonwealth* v. *Dextra*, 143 Mass. 28, the court held that keeping open a barber shop violated the Lord's Day law since the exception (contrary to the apparent understanding of the lower court judge and the complaining authorities) did not apply to keeping open a shop. The court, after reviewing the Seventeenth and Eighteenth Century origins of the Statute said at page 31:

> "This statute is substantially the same as that enacted in 1791, Chapter 58. The preamble to that latter statute sets forth at length the reasons of its

> passage, and is applicable to the statute now in force, as well as to the several laws enacted upon this subject since that time."

On the other hand, a plaintiff who shaved another in his home and sued for services could recover since a jury could have found this was a work of necessity. *Stone* v. *Graves*, 145 Mass. 353. In that case the court held that it was for the jury to decide whether "it was morally fit and proper that the plaintiff should shave him." Yet, one who gratuitously assisted another in cleaning a wheelpit on Sunday and was injured through negligence could not recover since this was not a work of necessity and charity as a matter of law. *McGrath* v. *Merwin*, 112 Mass. 467 (1873).

The cases involving travelling on Sunday (previously also forbidden except for necessity and charity), also indicate the difficulty involved in applying religious considerations to everyday situations. *Davis* v. *Somerville*, 128 Mass. 594 (1880), held that travelling to and from a funeral was a journey of necessity and charity while a detour to call upon a friend on the return trip was not; thus, the plaintiff injured by a defect in the highway while making this detour on Sunday could not recover for negligence. However, travelling to the home of a sick friend was a journey of necessity and charity. *Doyle* v. *Lynn and Boston Railroad Company*, 118 Mass. 195 (1875); and the plaintiff could recover from the railroad for negligence though travelling on Sunday. Recovery was, however, denied to one injured while travelling on Sunday to ascertain the condition of the home into which he was to move the next day. The court held that this was not a journey of necessity and charity. *Smith* v. *Boston and Maine Railroad*, 120 Mass. 490 (1876).

A contract made on Sunday is invalid because it is "secular business". *Kimball* v. *Thompson*, 13 Mass. 283, 286 (1864). But the creation of a trust for the settlor's support, funeral expenses, etc., was held valid in *Donovan*

v. *McCarthy*, 155 Mass. 543 (1893), since the exception for necessity and charity covered "everything which is morally fit and proper to be done under the peculiar circumstances of the case (p. 547)." Thus, in *Bennett* v. *Brooks*, 9 Allen 118 (1864), the court held that a will may be made on Sunday since it does not "appertain to ordinary wordly business (p. 122)." The court pointed out "the serious and solemn nature" of a last testament. This general notion would seem to be at the basis of the court's holding in *Carton* v. *Shea*, 312 Mass. 634 (1947), that the work of undertakers is a work of "necessity and charity."

II. The Lord's Day Law is a law respecting an establishment of religion and, therefore, in violation of the Fourteenth Amendment of the United States Constitution as it incorporates the First Amendment.

If illustration is necessary of the wisdom of the constitutional prohibition against "legislation for the support of any religious tenets or the modes of worship of any sect" (*Davis* v. *Beason*, 133 U. S. 333, 342) and against coercing any one "to observe a religious holiday" (*Zorach* v. *Clauson*, 343 U. S. 306, 314), such illustration is found in the history of Chapter 136, "Observance of the Lord's Day". This brief has given some indication of the divisive character of this Statute—from at least the early Nineteenth Century to this case in which the Seventh Day Adventists and a Jewish Rabbi were ranged against the Lord's Day League of New England and the Archdiocesan Council of Catholic Men (Record, p. 134).

This brief also indicates the determination of the Legislature to retain the avowed religious purpose of the statute and the reliance of the Supreme Judicial Court—despite the characterization in *Commonwealth* v. *Has*, *supra*—on religious considerations in adjudicating rights and liabilities under that statute. The resulting arbitrary hodgepodge gives modern point to Madison's Memorial and

Remonstrance against Religious Assessments (Appendix to *Everson* v. *Board of Education*, 330 U. S. 1, 67). He objected to the proposed Virginia law:

> "Because the bill implies either that the Civil Magistrate is a competent Judge of religious truth; or * * * the first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."

See also:

> *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, at 505.

Nor can this court substitute a secular basis for this statute. A corollary to the presumption of constitutionality of state legislation would seem to be the principle of judicial non-interference. But that principle, as this court has pointed out in an analogous situation in *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80, 88, is applicable "for purposes of affirming no less than reversing an administrative order". Paraphrasing the Court:

> A judicial judgment cannot be made to do service for a legislative judgment. For purposes of validating no less than invalidating legislation, a federal court cannot intrude upon the domain of the state. This court cannot ignore the avowed religious considerations at the foundation of the Lord's Day law from their origin to the present. It cannot assert that the legislature would have in any event passed this law as a day of rest law. Indeed, the legislature was, as indicated above, not concerned with a day of rest law until 1913; and then it passed what is now Chapter 149, Section 48. What, if any, changes Chapter 149, Section 48 may require, if the religiously based Lord's Day law cannot stand, is for the legislature, not this court, to determine.

Thus, a summary answer to attempts to retain this law as a day of rest law is that the Legislature has avowedly chosen to retain it as a religious law. This is the answer which this court gave to a similar *ad hoc* attempt to save a state statute. *McLeod v. Dilworth*, 322 U. S. 327, 330. *Civil Rights Cases*, 109 U. S. 3, 19. See also: *The Propeller Genessee Chief*, 12 Howard 443.

CONCLUSION

It is, therefore, respectfully submitted that General Law Chapter 136, and particularly Section 5, is unconstitutional.

Respectfully submitted,

REUBEN GOODMAN,
One State Street,
Boston 9, Massachusetts.

SAMUEL S. ROBINSON,
10 State Street,
Boston 9, Massachusetts.

ROWLAND WATTS,
% American Civil Liberties Union,
156 Fifth Avenue,
New York 10, New York,
Counsel for Amici.

APPENDIX

Massachusetts General Laws (Tercentenary Edition), Chapter 136, "Observance of the Lord's Day".

Section 5. (Keeping open shops or warehouses and conducting business or doing work on the Lord's day.) Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

Section 6. (Limit of operation of section 5.) The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen des-

sert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate, necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their power, and the towing of disabled motor vehicles; the the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof; or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of

livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter or cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or

private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. (As revised by St. 1934, c. 373, sec. 6; St. 1946, c. 207, sec. 4; and St. 1957, c. 356, secs. 16 and 17; as added by St. 1949, c. 190 and St. 1950, c. 322; and as amended by St. 1959, c. 256, sec. 1.)

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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 11.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL.,
Appellants,

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL.,
Appellees.

REPLY BRIEF FOR APPELLANTS.

EDWARD J. McCORMACK, JR.,
Attorney General of Massachusetts,
JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,
ARTHUR E. SUTHERLAND,
S. THOMAS MARTINELLI,
City Solicitor, Springfield,
Massachusetts,
JOHN WARREN McGARRY,
Assistant Attorney General,
Attorneys for Appellants.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

The Friedman case is governing authority here 6

Corrections 7

Table of Authorities Cited.

Cases.

Braunfeld v. Gibbons, U.S. Sup. Ct. No. 67, Appellate Docket, October 1960 4, 5

Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 8

Commonwealth v. Chernock, 336 Mass. 384 2

Commonwealth v. Has, 122 Mass. 40 2

Kennedy, ex parte, 42 Tex. Crim. R. 148, 58 S.W. 129 8

Masters-Jersey, Inc. v. Mayor of Paramus, 160 A. 2d 841 8

People v. Friedman, 302 N.Y. 75; app. dismissed, 341 U.S. 907 5, 6, 7, 8, 9

People v. Haym, 20 How. Pr. 76 6

People v. Praska, 302 N.Y. 75 7

Specht v. Commonwealth, 8 Pa. St. 312 8

State v. Hurliman, 143 Conn. 502, 123 A. 2d 195 8

Two Guys from Harrison-Allentown, Inc., v. McGinley, 179 F. Supp. 944 7

Statutes, Etc.

U.S. Constitution, Fourteenth Amendment 4

Mass. Constitution, Declaration of Rights

Art. II 2

Art. XI 3

Mass. General Laws, chapter 3
Section 56 2
Section 61 2
Sections 58-60 3
Mass. General Laws, chapter 136 3, 4
New York Penal Law, art. 192, secs. 2140-2154 6, 7

1960 Mass. Senate Document No. 525 3

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Regardless of their Original Religious Connotations, Massachusetts Sunday-Closing Laws, Like the Similar Laws of Other States, have through the Years Become Lay, "Civil" Regulations Providing a Day Off from Work, on which the People of the State can Rest and Seek Recreation. These Laws should be Held Constitutional like Other Statutes Regulating the Time of Labor.

The plaintiff Crown Kosher Super Market of Massachusetts, Inc., and the individual plaintiffs, here the appellees, devote a major part of their brief (seventeen of forty-two pages of argument) to contending that the Massachusetts Sunday-closing laws are, in the present time, primarily

laws of a religious character. To get around the obdurate fact of the contrary holding by the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Has*, 122 Mass. 40 (1877), they argue that that Court has since changed its mind (Appellee's Brief, page 31 and following).

To this argument there are several conclusive answers. For one thing, the Supreme Judicial Court has never in any opinion repudiated or criticized its statement in the *Has* case that Massachusetts Sunday legislation is "essentially a civil regulation . . ." (p. 42). The Constitution of Massachusetts, before *Has* and ever since, has guaranteed freedom of religion (see Art. II, Declaration of Rights); but the Supreme Judicial Court has never indicated any feeling that the Sunday closing laws violated this guaranty.

For another answer, the Supreme Judicial Court in 1957 relied on and cited *Has* in rejecting the argument put forward by Mr. Harold Chernock (President, General Manager and half-owner of the instant corporate plaintiff) that the Massachusetts Sunday closing laws, applied to convict him for keeping open the Crown Kosher Market on Sunday (R. 41), deprived him of religious freedom under the State Constitution.

> *Commonwealth* v. *Chernock*, 336 Mass. 384, at page 386 (1957).

Another answer is found in an official report of the Massachusetts Legislative Research Council, an official agency of the Commonwealth, created by Acts of 1954, chapter 607, section 2 (amending General Laws, chapter 3, section 56), consisting of two members of the Senate and four of the House of Representatives, charged by law (c. 3, § 61) with reporting to the General Court with the aid of a Legis-

lative Research Bureau (c. 3, §§ 58-60). This Council, as the brief of the appellants points out (pp. 45, 46), when ordered to report to the Massachusetts Senate concerning holidays and their observance, said of "Objectives of Sunday Legislation" that—

> "Health, peace and good order of society are thereby promoted. Such provision is essentially civil in character and the statutes are not regarded as religious ordinances."
>
> 1960 Massachusetts Senate Document No. 525.

For another answer, the Massachusetts Sunday closing laws (Appellants' Brief, Appendix A, pp. 80-96) demonstrate their own evolution and character by their present content. The ancient terminology of the early days of the New England settlements is in spots retained—as Sunday is still called "the Lord's Day" in these statutes. Similarly, in article XI of the Declaration of Rights of the Massachusetts Constitution the archaic term "Every subject of the commonwealth . . ." is still kept to describe each inhabitant of Massachusetts; but this old language does not make Massachusetts a kingdom. The multiple provisions in chapter 136, Massachusetts General Laws (Appellants' Brief, pp. 80-96), for necessities and amusements on Sunday—for distribution of electricity, for telephone service, for distribution of oxygen, for retail sale of medical supplies; for golf, tennis, bowling and beach amusements; for sale of ice-cream and candy; for live-bait for the non-commercial fisherman and for sale of gasoline to take him to his sport—all these demonstrate the character of the modern Sunday—a day of freedom from economically compulsory toil, when most men and women and their school-free children can choose, for one-seventh of their lives, what they will

do together—go to church, go to dig clams on Cape Cod, go to Revere Beach to amuse themselves, while meantime their essentials of life are available.

The appellees, in their brief (p. 50), comment that these Sunday recreations have been statutorily authorized in legislative response to demands of "pressure groups." Of course this is true. Massachusetts Sunday laws, like all legislative laws, are made because people want them, and tell their legislators so. These laws show that the people of Massachusetts asked, and obtained, a legislative pattern for a Sunday free from economically compulsory work in the factory and the department store, a day when the people could, for one day in the week, do as they pleased. Is Massachusetts forbidden by the Fourteenth Amendment to give her people this day they want?

The appellees, arguing that chapter 136 of Massachusetts General Laws establishes a religion or restricts its exercise, comment at page 26 of their brief:

> "It is significant that all of the intervenors below were religious organizations."

The appellants suggest in reply the significance of the briefs filed in this Court, in the companion case of *Braunfeld* v. *Gibbons*, No. 67, as *amici*, by the Pennsylvania Retailers' Association and the Retail Clerks International Association AFL-CIO. Both briefs demonstrate, with scholarly documentation, that the Sunday free-day, "a uniform, community day of rest," has long been an objective of the American working people. The Fourteenth Amendment surely does not forbid a State to achieve this objective. Yet, if one social group, because of its religious beliefs, can obtain a monopoly of the Sunday supermarket trade, all supermarket employees are ultimately faced with

the elimination of their "uniform community day of rest" (see Retail Clerks' brief in *Braunfeld* case, at page 3 *et seq.*).

Reaction, by retail storekeepers and their help, against destruction of their Sunday day off is not unique in 1960. The facts and the laws in *People v. Friedman*, 302 N.Y. 75 (1950), appeal dismissed for want of a substantial federal question 341 U.S. 907 (1951), are indistinguishable in any significant respect from those in the case at bar. The New York Court of Appeals record in *Friedman* (pp. 14-20, folios 41-59) sets forth the argument on the motion, ultimately granted, made by Abraham Brill, counsel for certain labor and retail merchants' groups, for leave to file an *amicus* brief "for the purpose of upholding the legality and the constitutionality of this prosecution." Mr. Brill applied for and obtained permission to file a brief on behalf of—

> ". . . the New Deal Kosher Butchers Association, Inc.; the Hebrew Butcher Workers Union of Greater New York, Local 234 of the Amalgamated Meat Cutters and Butcher Workmen of North America, affiliated with the American Federation of Labor Central Trades and Labor Council, United Hebrew Trades; United Retail Kosher Butchers Association; United Strictly Kosher Butchers U.V. of The Bronx; Federation of Kosher Butchers of Greater New York, Inc.; and the American Federation of Retail Kosher Butchers, Inc., . . ."
>
> New York Court of Appeals *Friedman* Record, p. 17, folios 49, 50.

This reaction, by men and women who do not want their common day off killed by competitive pressures, was dem-

onstrative that Sunday closing legislation has long since become social and economic regulation of the character of a week's work.

The Friedman Case is Governing Authority Here.

The majority opinion of the three-judge Court below in the instant *Crown-Kosher* case writes off the *Friedman* case by stating (R. 147) that the statutes there and here are "quite different," and that "the New York law has few characteristics or roots in history tending to indicate that it is a religious regulation." The appellees' brief in this Court in the present *Crown Kosher* litigation repeats this statement: "the record does not indicate that the New York law is a religious statute." Of course it "is" not a religious statute in 1960; neither is the Massachusetts statute here before this Court such a law. Both the New York and the Massachusetts statutes had 17th Century beginnings, when religion was an element in government. Both have become lay social and economic regulations in 1960.

The early history of New York Sunday legislation is described in the opinion in *People* v. *Haym*, 20 How. Pr. 76 (1860). The New York Sunday statutes, now and when *Friedman* was decided, are and were article 192 of the New York Penal Law, sections 2140-2154. Under section 2142, violation is described as "Sabbath breaking" and is made a misdemeanor. The historical note under section 2140 in McKinney's New York Penal Law, after describing the earliest 17th Century Sunday legislation in New York, goes on—

> "Then followed the Act of Oct. 22, 1695, containing provisions very similar to article 192 of the present Penal Law."

The New York and the Massachusetts Sunday legislation has long outlived any combined and now departed Church and State. While vestiges of its early language remain, the old form has received an entirely new content and the form itself has become modified to fit its new meaning. So in New York there is the comprehensive prohibition of Sunday work found in section 2143, qualified by provisions for Sunday baseball and bowling (§ 2145); for sale of necessaries, of the means of automobile travel, and of such Sunday diversions as newspapers, confectionery, flowers, souvenirs and beer (§ 2147). Processions of the military must stay a block away from churches (§ 2151). The New Yorker may go to the movies or to plays or to "concert and recital dances" if his city authorities permit (§§ 2152A and 2154).

The appellants here find differences only in detail between the New York legislation considered in *Friedman* and that now before the Supreme Court in *Crown Kosher*. In this connection the appellants urge on the Supreme Court the reasoning of Circuit Judge Hastie in *Two Guys From Harrison-Allentown, Inc.*, v. *McGinley*, 179 F. Supp. 944 (D.C. E.D. Pa. 1959), at page 948 and following:

Corrections.

Rereading their brief after it had been filed, the appellants find several lapses which they wish here to correct.

People v. *Friedman* and *People* v. *Praska*, 302 N.Y. 75 (1950), were disposed of by the United States Supreme Court by the following *per curiam*, 341 U.S. 907 (1951):

> "*Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question."

The appellants' brief correctly so states at pages 73 and 122, and at page 62 discusses the effect of such a dismissal without opinion as nevertheless a disposition on the merits and an authoritative precedent.' However, at page 37 of appellants' brief, in a reference to a law journal note, the *Friedman* case is stated to have been "affirmed" at 341 U.S. 907. This is an erroneous oversight.

At page 103, in Appendix B to appellants' brief, the note describing *State* v. *Hurliman*, 143 Conn. 502, 123 A. 2d 195 (1956), should read: "Conviction of delicatessen proprietor who sold liverwurst in violation of Sunday closing statute. Not convicted in violation of equal protection clauses . . ."

At page 119 the correct spelling of the name of the municipality in New Jersey sued by *Masters-Jersey Inc.*, 160 A. 2d 841 (Sup. Co. N.J. 1960) is Paramus.

At page 127 the date of *Specht* v. *Commonwealth*, 8 Pa. St. 312, should be 1848, not 1948.

At page 132 several words were omitted from the excerpt quoted from *Ex parte Kennedy*, 42 Tex. Crim. R. 148, 58 S.W. 129 (Ct. Cr. App. 1900). The first quoted sentence should read: "Sunday laws are almost universally held to be constitutional, as being within the police power of the State."

At page 134 several words were omitted from the excerpt quoted from *Broadbent* v. *Gibson*, 105 Utah 53, 140 P. 2d 939 (1943). The quoted matter should read: "The classification being on a commodity basis, it is arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or a can of coffee." The appellants, without expressing agreement with the Utah court or attempting to analyze the possible considerations prompting the Utah legislation, still desire to bring the Utah opinion correctly before the United States Supreme Court.

The appellants contend for reversal on *Friedman* v. *New York*, 341 U.S. 907 (1951), and the other governing authorities set out in their main brief.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General of Massachusetts,
JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,
ARTHUR E. SUTHERLAND,
S. THOMAS MARTINELLI,
City Solicitor, Springfield, Massachusetts,
JOHN WARREN McGARRY,
Assistant Attorney General,
Attorneys for Appellants.

SUPREME COURT OF THE UNITED STATES

No. 11.—October Term, 1960.

Gallagher, Chief of Police of the City of Springfield, Massachusetts, et al., Appellants, *v.* Crown Kosher Super Market of Massachusetts, Inc., et al.	On Appeal From the United States District Court for the District of Massachusetts.

[May 29, 1961.]

Mr. Chief Justice Warren announced the judgment of the Court and an opinion in which Mr. Justice Black, Mr. Justice Clark, and Mr. Justice Whittaker concur.

The principal issues presented in this case are whether the Massachusetts Sunday Closing Laws [1] violate equal protection, are statutes respecting the establishment of religion or prohibit the free exercise thereof.

Appellees are Crown Kosher Super Market, a corporation whose four stockholders, officers and directors are members of the Orthodox Jewish faith, which operates in Springfield, Massachusetts, and sells kosher meat and other food products that are almost exclusively kosher and which has many orthodox Jewish customers; three of Crown's customers of the Orthodox Jewish faith, whose religion forbids them to shop on the Sabbath and requires them to eat kosher food, as representatives of that class of patrons; and the chief orthodox rabbi of Springfield, as representative of a class of orthodox rabbis whose duties

[1] The statutory sections immediately before the Court are Mass. Gen. Laws Ann., c. 136, §§ 5 and 6. The Massachusetts Sunday Closing Laws in their entirety may be found in Mass. Gen. Laws Ann., c. 136; c. 131, § 58; c. 138, §§ 12 and 33; c. 149, §§ 47 and 48; c. 266, §§ 113 and 117. Those sections considered particularly relevant are set forth in an Appendix to this opinion.

include the inspecting of kosher food markets to insure compliance with Orthodox Jewish dietary laws.

Crown had previously been open for business on Sunday, on which day it had conducted about one-third of its weekly business. No other supermarket in the Springfield area had kept open on Sunday. Since the Orthodox Jewish religion requires its members to refrain from any commercial activity on the Sabbath—from sundown on Friday until sundown on Saturday, Crown was not open during those hours. Although there is a statutory provision which permits Sabbatarians to keep their shops open until 10 a. m. on Sunday for the sale of kosher meat, Crown did not do so because it was economically impractical; for the same reasons, Crown did not open after sundown on Saturday.

Those provisions of the law immediately under attack are in a section entitled "Observance of the Lord's Day." They forbid, under penalty of a fine of up to fifty dollars, the keeping open of shops and the doing of any labor, business or work on Sunday. Works of necessity and charity are excepted as is the operation of certain public utilities. There are also exemptions for the retail sale of drugs, the retail sale of tobacco by certain vendors, the retail sale and making of bread at given hours by certain dealers, and the retail sale of frozen desserts, confectioneries and fruits by various listed sellers. The statutes under attack further permit the Sunday sale of live bait for noncommercial fishing; the sale of meals to be consumed off the premises; the operation and letting of motor vehicles and the sale of items and emergency services necessary thereto; the letting of horses, carriages, boats and bicycles; unpaid work on pleasure boats and about private gardens and grounds if it does not cause unreasonable noise; the running of trains and boats; the printing, sale and delivery of newspapers; the operation of bootblacks before 11 a. m., unless locally prohibited; the wholesale and retail sale of milk, ice and fuel; the

wholesale handling and delivery of fish and perishable foodstuffs; the sale at wholesale of dressed poultry; the making of butter and cheese; general interstate truck transportation before 8 a. m. and after 8 p. m. and at all times in cases of emergency; intrastate truck transportation of petroleum products before 6 a. m. and after 10 p. m.; the transportation of livestock and farm items for participation in fairs and sporting events; the sale of fruits and vegetables on the grower's premises; the keeping open of public bathhouses; the digging of clams; the icing and dressing of fish; the sale of works of art at exhibitions; the conducting of private trade expositions between 1 p. m. and 10 p. m.

These statutes do not prohibit Sunday business and labor by Sabbatarian observers so long as it disturbs no other person. However, this has been construed to forbid the keeping open of shops for the sale of merchandise. *Commonwealth* v. *Has,* 122 Mass. 40. Permission is granted by local option for the Sunday operation after 1 p. m. of amusement parks and beach resorts, including participation in bowling and games of amusement for which prizes are awarded. Special licenses for emergency Sunday work may be obtained from local officials.

Other provisions of the Massachusetts Sunday legislation make generally unlawful Sunday attendance or participation in any public entertainments except for those which are duly licensed locally, conducted after 1 p. m., and are in keeping with the character of the day and not inconsistent with its due observance.

Although there is a general bar of games and sports on Sunday, professional sports may be played between 1:30 p. m. and 6:30 p. m. and indoor hockey and basketball any time after 1:30 p. m.; amateur sports may be played between 2 p. m. and 6 p. m.; this is all subject to local option and no game may be conducted within one thousand feet of any regular place of worship except in a public playground or park. There are specific bans on auto

racing, horseracing, boxing and hunting with firearms. And there are a number of additional exemptions from the general proscription. Golf, tennis, dancing at weddings, concerts of sacred music and the celebration of religious customs or rituals are all allowed on Sunday as are the operation of miniature golf courses and golf driving ranges after 1 p. m. Motion pictures may be exhibited after this hour if a local license is obtained. Parades with music for certain commemorative purposes may be held on Sunday by veterans', civic, fraternal, policemen's and firemen's organizations providing that they are suspended while passing within two hundred feet of public worship services.

Persons who keep places of public entertainment or refreshment lose their licenses if they entertain, on Sunday, people other than travelers, strangers or lodgers. With limited exceptions, discharging firearms for sport except on one's own land, fishing for commercial purposes, and fishing with nets or spears are prohibited on Sunday. The use of gaming devices is not allowed. Outdoor exercise without the element of contest is generally permitted as is the taking of mammals by means of traps. Heavier penalties are imposed for the willful cutting and destruction of timber, shrubs, fruits or vegetables on Sunday than on other days of the week.

Still other statutory sections make it a crime for most employers to require their employees to engage in ordinary occupation on Sunday unless the employee is allowed twenty-four consecutive hours off during the following six days. The sale of alcoholic beverages by certain licensees is permitted on Sunday after 1 p. m., by local option. However, patrons consuming the beverages on the premises must be seated at tables.

Appellees sought permanently to enjoin the enforcement of the statute against them, alleging that appellant, Springfield's chief of police, had previously arrested and prosecuted Crown's manager for keeping open on Sun-

day; that, unless restrained, appellant would continue to enforce the statute against Crown; that the statute was unconstitutional for the reasons stated above. The three-judge Federal District Court, one judge dissenting, agreed with appellees, 176 F. Supp. 466. On appeal brought under 28 U. S. C. § 1253, we noted probable jurisdiction, 362 U. S. 960.

I.

The equal protection arguments advanced by appellees are much the same as those made by appellants in *McGowan* v. *Maryland*, — U. S. —, —. They contend that the exceptions to the statute are so numerous and arbitrary as to be found to have no rational basis;[2] that the law permits the sale of certain food items sold by Crown but limits this permission to selected types of stores; that the employees in the exempted activities are just as much in need of a day of rest as are Crown's employees. The three-judge District Court described the present statutory system as an "unbelievable hodgepodge" and sustained appellees' allegations.

The answers to these arguments are likewise similar to those given in *McGowan* when the contentions are examined under the standards set forth in that opinion. Many of the exceptions in the Massachusetts Sunday Laws are reasonably explainable on their face. Such items as tobaccos, confectioneries, fruits and frozen desserts could have been found by the legislature to be useful in adding to Sunday's enjoyment; such items as newspapers, milk and bread could have been found to be required to be sold fresh daily.[3] It is conceivable that

[2] A similar argument made is that the exemptions from the statutes' proscription "eat up the rule," bear no rational relationship to the alleged interest of the State and therefore violate due process.

[3] It may be noted that, contrary to the interpretation of the court below, since there is no restriction on the sale of milk, Crown may vend it at any time on Sunday.

the legislature believed that the sale of fish and perishable foodstuffs at wholesale would not detract from the atmosphere of the day, while the retail sale of these items would inject the distinctly commercial element that exists during the other six days of the week. It is fair to believe that the allowance of professional and amateur sports on Sunday would add to the day's special character rather than detract from it. And the legislature could find that the circumstances attendant to the conduct of professional sports are sufficiently different from those of amateur sports to justify different treatment as to the hours during which they may be played. Furthermore, the legislature could determine that, although many retailers, including Crown, sell frozen desserts, to permit only a limited number of innholders, druggists and common victuallers to sell them on Sunday would serve the public purpose of providing these items on Sunday and, at the same time, limit the commercial activities ordinarily attendant to their sale. And, if such determination requires t' is limited number of stores to be open to serve the public interest, the employees of most of the stores are still protected by the statutory provision giving the employees another day of rest. To permit all stores which sell the exempted products to remain open on Sunday but to limit them to the sale of the exempted items might well be believed to impose near insuperable enforcement problems.

The fact is that the irrationality of these and the many other apparently reasonable distinctions has not been shown. The presumption of validity upon which the other classifications stand has not been dispelled. "A classification having some reasonable basis does not offend against [the equal protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Lind-*

sley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. Thus, we hold that the Massachusetts Sunday Laws do not violate equal protection of the laws.

II.

Appellees make several contentions that the statutes violate the constitutional guarantees of religious freedom. *First*, they allege that the statute is a law respecting an establishment of religion in that both its original and current purpose is to enforce the observance of Sunday as the Sabbath.

We agree with the court below that, like the Sunday laws of other States, the Massachusetts statutes have an unmistakenly religious origin. The first enactment of the Plymouth Colony in 1650 stated simply that "whosoever shall prophane the Lords day by doeing any servill worke or any such like abusses" shall either be fined or whipped. The Compact, Charter and Laws of the Colony of New Plymouth, 92. Eight years later, a ban on Sunday traveling was enacted with the following preamble:

> "Wheras complaint is made of great abuses in sundry places of this Govrment of prophaning the Lords day by travellers both horse and foot by bearing of burdens carrying of packes &c. upon the Lords day to the great offence of the Godly welafected among us." *Id.*, at 113.

And, in 1671, the religious purpose was made clear beyond doubt:

> "9. This Court taking notice of great abuse and many misdemeanours committed by divers persons in these many wayes. Profaneing the Sabbath or Lord's-day, to the great dishonour of God, Reproach of Religion, and Grief of the Spirits of God's People.
>
> "Do therefore Order, That whosoever shall Prophane the Lord's-day, by doing unnecessary servile

> Work, by unnecessary travailing, or by sports and recreations, he or they that so transgress, shall forfeit for every such default forty shillings, or be publickly whipt: But if it clearly appear that the sin was proudly, Presumptuously and with a high hand committed, against the known Command and Authority of the blessed God, such a person therein Despising and Reproaching the Lord, shall be put to death or grievously punished at the Judgement of the Court.
>
> "10. And whosoever shall frequently neglect the public Worship of God on the Lords day, that is approved by this Government, shall forfeit for every such default convicted of, ten shillings, especially where it appears to arise from negligence, Idleness or Prophaness of Spirit." *Id.*, at 247.

The Sunday regulations of the Massachusetts Colony were no different. The 1653 version spoke of the abuses of the Dishonor of God and the Reproach of Religion which were Grieving the Souls of God's Servants. Among other things, the statute forbade Drinking and Sporting on Sunday. The Colonial Laws of Massachusetts 132–133. In 1665, Neglect of God's Public Worship was made a crime. *Id.*, at 133. Every person was required to apply himself to Duties of Religion and Piety on Sunday according to the 1692 statute which continued the ban on Sunday sports. Charter of the Province of the Massachusetts-Bay in New-England 13–14. The preamble to the new statute in 1761 retained the Religion and Piety language and added that Profanation of the Lord's Day is highly offensive to Almighty God. This statute retained and strengthened the former prohibitions. *Id.*, at 392–394.

A change came about in 1782. The preamble added the following:

> "Whereas the Observance of the Lord's Day is highly promotive of the Welfare of a Community, by affording necessary Seasons for Relaxation from Labor and the Cares of Business; for moral Reflections and Conversation on the Duties of Life, and the frequent Errors of human Conduct; . . ." Acts and Laws of the Commonwealth of Massachusetts 63.

Thus, the statute's announced purpose was no longer solely religious. But this statute proscribed the Sunday attendance at any Concert of Music and Dancing in addition to the previously mentioned activities. *Ibid.* This law was re-enacted in 1792. 2 Laws of Massachusetts 536 *et seq.*

However, when we examine the statutes now before the Court, we find that, for the most part, they have been divorced from the religious orientation of their predecessors. The preambles' statements, in certain terms, of religious purpose exist no longer. Sports of almost all kinds are now generally allowed on Sunday. The absolute prohibition against alcoholic beverages has disappeared. Concerts and dancing are permitted. Church attendance is no longer required.

Admittedly, the statutes still contain references to the Lord's Day and some provisions speak of weekdays as being secular days. Although § 2 of c. 136 excepts concerts of *sacred* music, the next clause of the section permits free open-air concerts. It would seem that the objectionable language is merely a relic. The fact that certain Sunday activities are permitted only if they are "in keeping with the character of the day and not inconsistent with its due observance," does not necessarily mean that the day is intended to be religious; the "char-

acter" of the day would appear more likely to be intended to be one of repose and recreation. We are told that those provisions forbidding certain activities to be conducted within a set distance from a place of public worship are especially devoted to maintaining Sunday as the Sabbath. But because the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all. See *Everson* v. *Board of Education*, 330 U. S. 1, 16. Although many of the more recently allowed Sunday activities may not commence prior to 1 p. m., others may be undertaken at any time during the day. And the contention that evening church services are being protected cannot be maintained since most of those activities that begin after 1 p. m. may continue throughout the day.

Furthermore, the long list of exemptions that have been recently granted evidences that the present scheme is one to provide an atmosphere of recreation rather than religion. The court below pointed out that, since 1858, the statutes have been amended more than seventy times. It would not seem that the Sunday sales of tobacco, soda water, fruit, et cetera, are in aid of religion. It would seem that the operation of amusement parks and beach resorts is in aid of recreation.

An examination of recent Massachusetts legislative history bolsters the State's position that these statutes are not religious. In 1960, a report of the Legislative Research Council stated:

> "In general, Sunday laws protect the public by guaranteeing one day in seven to provide a period of rest and quiet. Health, peace and good order of society are thereby promoted. Such provision is essentially civil in character and the statutes are not regarded as religious ordinances." Report of the Legislative Research Council relative to Legal Holi-

days and their Observance, Mass. Leg. Docs., Sen. Doc. No. 525 (1960), 24.[4]

The earliest pronouncements of the Supreme Judicial Court of Massachusetts are further indication of the religious origin of the Sunday Laws. In *Pearce* v. *Atwood*, 13 Mass. 324, 348 (1816), it was stated that the statute's sole object was "ensuring reverence and respect for one day of the week, in order that religious exercises should be performed without interruption from common and secular employments." In *Bennett* v. *Brooks*, 91 Mass. 118, 119 (1864), the day was characterized as one "set apart for religious services and observances."

In 1877, a case arose in which a charge of violation of religious freedom was made. The Supreme Judicial Court relied on the Pennsylanvia case of *Specht* v. *Commonwealth*, 8 Pa. 312, and stated clearly:

> "It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare.

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[4] A 1953 report concluded:
"The wave of materialism which is sweeping the country makes it most important that one day be set aside for worship, rest and to give all persons an opportunity to strengthen the bulwark of our American civilization—the home." Report of the Unpaid Special Commission to Investigate and Study the Provisions of the Laws Relating to the Observance of the Lord's Day, Mass. Leg. Docs., H. Doc. No. 2413 (1953) 9.

> The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community." *Commonwealth* v. *Has*, 122 Mass. 40, 42 (1877).

The court below characterized this decision as an *ad hoc* improvisation by the Massachusetts court. Of course, the court below was correct in deciding that it was not bound by the Massachusetts characterization of the statutes. See *Society For Savings* v. *Bowers*, 349 U. S. 143, 151. But ten years later, in *Commonwealth* v. *Starr*, 144 Mass. 359, 361, 11 N. E. 533, 534 (1887), another religious charge against the statute was made; it was rejected on the authority of *Has*.

As the court below pointed out, there have been several cases,[5] between 1877 and 1923, which gave a religious characterization to the statute. But in none of these cases was there a contention regarding religious freedom, and none of the cases stated the statute's purpose to be exclusively religious.[6] Finally, in the only recent case passing

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[5] *Davis* v. *Somerville*, 128 Mass. 594 (1880); *Commonwealth* v. *Dextra*, 143 Mass. 28, 8 N. E. 756 (1886); *Commonwealth* v. *White*, 190 Mass. 578, 77 N. E. 636 (1906); *Commonwealth* v. *McCarthy*, 244 Mass. 484, 138 N. E. 835 (1923).

[6] *E. g.*, "The Legislature intended by this statute to keep the ordinary places of traffic, business, and work closed on this day, so that those persons who desired to relax from labor and business, and

on the Massachusetts Sunday Closing Laws, *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N. E. 2d 920 (1957), the court summarily dismissed the complainant's religious contention, relying on *Has*.

The relevant factors having been most carefully considered, we do not find that the present statutes' purpose or effect is religious. Although the three-judge court found that Massachusetts had no legitimate secular interest in maintaining Sunday closing, we have held differently in *McGowan* v. *Maryland*, *supra*. And, for the reasons stated in that case, we reject appellees' request to hold these statutes invalid on the ground that the State may accomplish its secular purpose by alternative means that would not even remotely or incidentally aid religion.

Secondly, appellees contend that the application to them of the Sunday Closing Laws prohibits the free exercise of their religion. Crown alleges that if it is required by law to abstain from business on Sunday, then, because its owners' religion demands closing from sundown Friday to sundown Saturday, Crown will be open only four and one-half days a week, thereby suffering extreme economic disadvantage. Crown's Orthodox Jewish customers allege that because their religious beliefs forbid their shopping on the Jewish Sabbath, the statute's effect is to deprive them, from Friday afternoon until Monday of each week, of the opportunity to purchase the kosher food sanctioned by their faith. The orthodox rabbis allege that the statutes' effect greatly complicates their task of supervising the condition of kosher meat because the meat delivered on Friday would have to be kept until Monday. Furthermore, appellees contend that, because of all this, the statute discriminates against their religion.

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attend to private and public worship, might not be disturbed by persons pursuing their worldly business and avocations in open shop." *Commonwealth* v. *Dextra*, *supra*, at p. 31, 8 N. E., at p. 759.

s are similar, although not as grave, as
pellants in *Braunfeld* v. *Brown*, —
the decision in that case rejects the
ted by these appellees on the merits,
e whether appellees have standing to
ns.

ANKFURTER and MR. JUSTICE HARLAN
e opinion.

decision below is

Reversed.

dvanced several procedural arguments. Since
as ancillary issues and were not orally argued,
nation is not necessary to the disposition of the
nted, we deem it inappropriate to pass upon

APPENDIX.

Massachusetts General Laws Annotated, c. 136.

§ 1. *Lord's day, definition.* The Lord's day shall include the time from midnight to midnight.

§ 2. *Presence at games, sports, plays or public diversions on the Lord's day; exceptions.* Whoever on the Lord's day is present at a game, sport, play or public diversion, except a concert of sacred music, a public entertainment duly licensed as provided in section four or a free open air concert given by a town, or by license of the mayor or the selectmen, upon a common or public park, street or square, or except a game of golf conducted on an open air golf course, or except a game of tennis or dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing, or except after one o'clock post-meridian a game of outdoor lawn bowling or the playing of golf or driving on an outdoor golf driving range or playing on a miniature golf course, so called, shall be punished by a fine of not more than five dollars. Whoever on the Lord's day takes part in any game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not more than fifty dollars. This and the following section shall not apply to amusement enterprises lawfully conducted under section four A or four B or to sports or games conducted in accordance with sections twenty-one to twenty-five, inclusive, in any city or town which accepts said sections or in accordance with sections twenty-six to thirty-two, inclusive, in any city or town in which said sections twenty-six to thirty-two are then in force.

§ 3. *Establishing and maintaining public entertainment on the Lord's day.* Whoever offers to view, sets up, establishes, maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining any public enter-

tainment on the Lord's day, except as provided in section two, unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four, or whoever on the Lord's day acts as proprietor, manager or person in charge of a game, sport, play or public diversion, except a public entertainment licensed under section four and except as provided in section two, shall be punished by a fine of not more than five hundred dollars.

§ 4. *License to hold public entertainment on the Lord's day; application; fee; suspension; revocation; hearing.* Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant upon such terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, including musical entertainment provided by mechanical or electrical means, in keeping with the character of the day and not inconsistent with its due observance, whether or not admission is to be obtained upon payment of money or other valuable consideration, and, if the proposed entertainment described in the application is solely for the exhibition of motion pictures, for the benefit of patrons in a public dining room or for the use of television, the use of radio, or musical entertainment provided by mechanical or electrical means, the mayor or selectmen may grant an annual license therefor; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. The application for the approval of the proposed entertainment by the commissioner shall be accom-

panied by a fee of two dollars, or, in the case of an application for the approval of an annual license, as herein provided, by a fee of fifty dollars. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. The foregoing provisions, insofar as they authorize any person to refuse to grant, or to suspend, revoke or annul a license upon the ground that the proposed entertainment is not in keeping with the character of the Lord's day or not consistent with its due observance, and insofar as they require written approval of the proposed entertainment by said commissioner, shall not apply to any person making an application for a license to exhibit motion pictures or for the use of radio or television on said day, nor to any license issued upon such application.

§ 4A. *Maintenance and operation of enterprises at amusement parks, beaches or resorts on the Lord's day; licenses; suspension; revocation.* The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe, may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely:— Bowling alleys, shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre, photographic galleries or studios in which pictures are made and sold, games, and such amusement devices as may lawfully be operated therein on secular days; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed

enterprise shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as provided in the case of public entertainments under section four. Any licensee hereunder may distribute premiums or prizes in connection with any game or device lawfully maintained and operated by him under authority hereof. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. So much of this section as relates to the maintenance and operation of bowling alleys shall not apply in any city or town which shall have accepted the provisions of section four B.

§ 4B. *Licenses for operation of bowling alleys on the Lord's day.* In any city which accepts this section by vote of its city council and in any town which accepts this section by vote of is inhabitants, the city council, with the approval of the mayor, or the selectmen, as the case may be, may grant licenses for the operation of bowling alleys on the Lord's day between the hours of one and eleven post meridian; provided, that no such license may authorize the operation of bowling alleys on Easter, or on Christmas day if such day falls on the Lord's day. Every license granted hereunder shall specify the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Bowling alleys operated under such licenses shall be operated subject to such regulations and restrictions as shall be prescribed from time to time by the city council, with the approval of the mayor, or by the selectmen. Said regulations and restrictions shall be stated in the license. Said licensing authorities may at any time and without previous notice revoke licenses issued under this section if they have reason to believe that any provision of this

section, or of any regulation or restriction prescribed thereunder, is being or will be violated.

§ 5. *Keeping open shops or warehouses and conducting business or doing work on the Lord's day.* Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

§ 6. *Limit of operation of section 5.* The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power, the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen

desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use of fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats, the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or bot , or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transporta-

tion of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day o. Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the culti-

vation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him.

§ 7. *Sale or frozen desserts, frozen dessert mix or confectionery on the Lord's day.* In Boston, and in any other city or town which accepts this and section eight or has accepted corresponding provisions of earlier laws, in a city by its city council or in a town by the voters of the town at an annual town meeting, the licensing board or officer in such city or town, or if there is no such board or officer the aldermen of a city, or if there are no aldermen the city council, with the approval of the mayor, or the selectmen of a town, may grant, to any reputable person who on secular days is a retail dealer in froden desserts and/or frozen dessert mix, confectionery, soda water or

fruit and who does not hold a license for the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, a license to keep open his place of business on the Lord's day for the sale of frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit.

§ 9. *Permit for performance of necessary work or labor on the Lord's day.* The police commissioner of Boston, or any member of the police department having a rank not lower than that of captain and designated by said commissioner, or the chief of police or other officer in charge of the police department of any other city or of any town, or the chairman of the board of selectmen of any town, upon such terms and conditions as he deems reasonable, may issue a permit for the performance on the Lord's day of necessary work or labor which in his judgment could not be performed on any other day without serious suffering, loss, damage or public inconvenience. Such permit shall cover not more than one day and shall not be issued more than six days prior to the day for which it is issued.

§ 21. *Athletic outdoor sports or games.* In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council, or in any town which accepts said sections by vote of its inhabitants, it shall be lawful on the Lord's day to take part in or witness any athletic outdoor sport or game, as hereinafter provided, between the hours of one thirty and six thirty post meridian and, in the case of a baseball game commenced before the hour of six thirty post meridian, for such further time beyond said hour as may be necessary to complete said game; provided, that said game had been scheduled to commence at or before the hour of three post meridian, or is the second of two successive games to be played on the same day, the first of which had been schedulede to commence at or before the hour of two post meridian. In

any such city or town it shall be lawful on the Lord's day to take part in or witness, as hereinafter provided, any indoor hockey or basketball game between the hours of one thirty post meridian and twelve midnight.

§ 22. *Licensed playgrounds or parks for athletic outdoor sports or games.* Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority, and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

§ 26. *Athletic outdoor sports or games not involving pecuniary reward, remuneration or consideration.* In any city or town wherein the corresponding provisions of this and the six following sections were in effect on the sixth day of December, nineteen hundred and twenty-eight, and which has not voted against said sections on resubmission as provided in section thirty-one, and has not accepted the provisions of sections twenty-one to twenty-five, inclusive, as provided in section twenty-one, it shall be lawful to take part in or witness any athletic outdoor sport or game, in which the contestants do not receive and have not been promised any pecuniary reward, remuneration or consideration whatsoever directly or indirectly in connection therewith, on the Lord's day between the hours of two and six in the afternoon as hereinafter provided.

§ 27. *Licensed playgrounds or parks for athletic outdoor sports or games not involving pecuniary award, remuneration or consideration.* Such sports or games shall take place on such playgrounds, parks or other places as may

be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

SUPREME COURT OF THE UNITED STATES

No. 11.—October Term, 1960.

Gallagher, Chief of Police of the City of Springfield, Massachusetts, et al., Appellants, *v.* Crown Kosher Super Market of Massachusetts, Inc., et al.	On Appeal From the United States District Court for the District of Massachusetts.

[May 29, 1961.]

Mr. Justice Brennan and Mr. Justice Stewart dissent. They are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion. See their dissenting opinions in *Braunfeld* v. *Brown*, *post*, p. ——.